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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 207

COMPRESS OF UNION, ET AL.,
Petitioners,

vs.

A. H. STONE, Tax Commissioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 207

COMPRESS OF UNION, ET AL.,
Petitioner,

vs.

A. H. STONE, TAX COMMISSIONER.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Compress of Union, a Mississippi corporation (called plaintiff), with J. W. Henry and J. N. Cole, Jr., sureties on the appeal bond to the Mississippi Supreme Court, called petitioner, show:

A.

Summary Statement of Matter Involved.

Plaintiff, in Mississippi, compresses and stores bales of cotton, being licensed as a Warehouse under the United States Warehouse Act, Chapter 313, 39 Stat. 486, as amended, Chapter 10, 42 Stat. 1282, U. S. C. A., Title 7, Sections 241, *et seq.*, serving the Commodity Credit Corporation, herein called Credit Corporation, an agency of the

United States, chartered under the laws of Delaware, pursuant to Executive Order 3640, possessing statutory immunity from State taxation, Act March 8, 1938, Chapter 44, Section 5, 52 Stat. 108, 15 U. S. C. A., 713a-5, Pocket Edition (Appendix A hereto).

Under Chapter 119, Laws of Mississippi, 1934, and amendments thereto, (Appendix B), plaintiff deducted from its sales tax return amounts received for compressing and storing each bale of cotton for Credit Corporation, aggregating $41,025.50, and was compelled to pay two per cent thereof, aggregating $820.15 under protest, wherefor recovery is sought.

The Mississippi statutes are epitomized in the argument, *infra*, and appear in full, Appendix B hereto.

Statement of the Case.

Plaintiff, on April 5, 1939, in the Newton County Court, sued respondent, alleging

(1) Plaintiff was in the business of warehousing and compressing cotton, being duly licensed under the United States Warehouse Act, *supra;*

(2) Respondent as Tax Commissioner, must enforce the Mississippi statutes, (Appendix B).

(3) Respondent claimed liability of plaintiff for such amount wrongfully exacted as an additional tax under said statutes on account of "storage and compression charges collected by plaintiff from Commodity Credit Corporation, an agent and instrumentality of the United States Government, for the period from July 1, 1937 to April 30, 1938."

(4) Said tax represents 2% "of the gross amount of the compression and storage charges collected by it from Commodity Credit Corporation, under and by virtue of contracts between plaintiff and Commodity Credit Corporation,

which provide that the cotton shall be compressed at a fixed price per bale, and that it shall be stored at a fixed price per bale per month * * *." The Credit Corporation "is essentially a lending institution, making loans principally to producers to finance the carrying and orderly marketing of agricultural commodities, all pursuant to the provisions of the Agricultural Adjustment Act of the United States * * * in all cases, the cotton on which loans were made, was stored in a duly licensed and approved warehouse * * *, the cotton being stored and held pursuant to contracts * * * between the Warehouseman and Commodity Credit Corporation. Plaintiff was not liable for the payment of the alleged additional tax * * * because that amount represented 2% of the gross amount collected by it as storage and compression charges from the Commodity Credit Corporation (being sales of service)."

"The State of Mississippi is prohibited by its own legislative act and by the Constitution of the United States and its statutes, from levying and collecting a tax on sales thus made to the United States Government through its agency and instrumentality, the Commodity Credit Corporation, and the exaction of the alleged tax violates the Constitution of the United States and Statutes thereof because it is a direct burden upon the exercise of a Federal governmental function. The collection of the alleged tax hinders Commodity Credit Corporation in the efficient exercise of the powers and duties which it was organized to discharge, increases the cost of the service which this instrumentality renders in behalf of the United States Government, deprives it of the power to properly and freely serve the Government in the manner intended, is a direct obstruction to the exercise of Federal powers, and violates the immunity of the Federal Government from taxation by the States. The imposition of the alleged tax on the business and functions

of Commodity Credit Corporation in its dealings with Plaintiff was, therefore, unauthorized and unlawful, and Plaintiff is entitled to repayment of same from the Defendant."

To this declaration, respondent demurred, raising certain local questions adversely decided, but further assigning:

"5. Neither the Constitution of the United States nor the Constitution of the State of Mississippi prohibits the State from levying and collecting the tax paid by plaintiff.

"6. The tax levied upon and collected from plaintiff is not a tax on the United States Government or any instrumentality thereof" (R. 8-9).

The demurrer was sustained (R. 11), appeal had, and the Supreme Court, the highest court of Mississippi where the question could be considered, ruled against petitioner and thereby the question is sought to be brought here.

There was no opinion in the Circuit Court, but the opinion in the Supreme Court appears as Appendix C, as yet unofficially reported.

The judgment in the Circuit Court of Newton County was entered August 18, 1939 (R. 11), the final judgment in the Supreme Court of Mississippi, April 8, 1940.

B.

Reasons Relied on for Allowance of Writ.

The questions here are important—

(a) May Mississippi impose a privilege tax upon a Federally licensed warehouse and compress company, measured by gross receipts, from (1) compression, and (2) storage of each bale of cotton stored or compressed by the Credit Corporation, whereunder the cost to such Credit Corporation is essentially augmented by such tax, when,

as to such Credit Corporation, there is operative a broad Federal immunity, delineated in the Commodity Credit Corporation Act (Appendix A hereto). 52 Stat. 108, 15 U. S. C. A. 713a-5.

Compare *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21, 84 L. Ed. 16; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703, 29 A. L. R. 1; *McGoldrick* v. *Compagnie Generale Transatlantique*, — U. S. —, 84 L. Ed. 602; *McGoldrick* v. *Gulf Oil Corporation*, — U. S. —, 84 L. Ed. 597.

(b) Whether, pursuant to the express provisions of exemption of the Credit Corporation, as a Federal instrumentality, the tax imposition contravenes the Federal Constitution as to national sovereignty. *United States* v. *Arlene Summerlin*, — U. S. —, 84 L. Ed. 963, authorities *supra*.

(c) The immunity of the Commodity Credit Corporation under the Commodity Credit Corporation Act (Appendix A), approved March 8, 1938, must have thereinto integrated, to effectuate the intent of Congress, the decisions of this Court then (March 8, 1938) existent and controlling. This Court by a change of decision since March 8, 1938, is powerless to amend by judicial legislation this Act of Congress and thereby change the immunization granted at the time of its enactment.

(d) And for other causes apparent.

WHEREFORE, petitioner prays for a Writ of Certiorari to the Supreme Court of the State of Mississippi, commanding that court forthwith to certify to this Court for review on a day certain therein named a full and complete transcript of the records and of proceedings in the cause entitled and numbered on its docket, *Compress of Union* v. *Stone*, No. 34,011, and that said judgment of said court may

be reversed and petitioner prays for such other and further relief as to this Honorable Court seems meet. Therefor petitioner prays.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 207

COMPRESS OF UNION ET AL.,

Petitioner,

vs.

A. H. STONE, TAX COMMISSIONER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Circuit Judge delivered no opinion, but merely entered his judgment. The opinion of the State Supreme Court appears in the Transcript, page 14, and is also here appended (Appendix C), having been initially decided by Division "A", January 29, 1940, compare *Mississippi State Tax Commission* v. *Brown,* in banc, 193 So. 794 (Appendix D).

II.

Judisdiction.

Jurisdiction is claimed under Judicial Code 237, as amended, Revised Statutes, 690, 709, March 3, 1911, Chap-

ter 231, Section 236, 237, 36 Stat. 1156; Dec. 23, 1914, chapter 2, 38 Stat. 790; Sept. 6, 1916, chapter 448, Section 2, 39 Stat. 726; Feb. 17, 1922, chapter 54, 42 Stat. 366; Feb. 13, 1925, chapter 229, Section 1, 43 Stat. 937; 28 U. S. C. A., Sec. 344b.

The Supreme Court of Mississippi, the highest court of that State in which a decision could be had, wrongfully denied the rights, privileges and immunities specifically claimed under the Federal Constitution and Federal statutes.

III.

Statement of the Case.

A statement has been heretofore made in the application for the Writ of Certiorari which, when requisite, will be supplemented under the specific points.

IV.

Specification of Errors.

The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Newton County and in refusing to grant plaintiff the relief claimed because—

(a) Said tax (Appendix B), contravenes that Federal Statute (Appendix A), March 8, 1938, Chapter 44, Section 5, 52 Statutes 108, 15 U. S. C. A. (Supplement) 713a—5, Mississippi being without power by reason of said Federal Statute to exact a privilege tax of 2% of the gross receipts arising from the amount paid by the Credit Corporation for (a) storage, and (b) compression, of each bale of cotton handled by such Federal Warehouse for such Credit Corporation.

(b) Said statute (Appendix B) is, as construed, an unconstitutional imposition upon the Federal instrumentality

where Congress has vouchsafed complete immunity to the Credit Corporation. *United States* v. *Arlene Summerlin*, — U. S. —, 84 L. Ed. 963.

(c) The immunity of the Commodity Credit Corporation under the Commodity Credit Corporation Act (Appendix B), approved March 8, 1938, must have thereinto integrated, to effectuate the intent of Congress, the decisions of this Court then (March 8, 1938) existent and controlling. This Court by a change of decision since March 8, 1938, is powerless to amend by judicial legislation this act of Congress and thereby change the immunization granted at the time of its enactment.

(d) And for other causes apparent.

V.

Manner Wherein Federal Questions Were Raised.

In the declaration (R. 1) there is specific averment made of the rights of plaintiff under the Constitution and statutes of the United States, the averment thereasto being:

> "The State of Mississippi is prohibited by its own legislative act and by the constitution of the United States and its statutes from levying and collecting a tax on the sales thus made to the United States Government through its agency and instrumentality, the Commodity Credit Corporation, and the exaction of the alleged tax violates the constitution of the United States and Statutes thereof because it is a direct burden upon the exercise of a federal governmental function. The collection of the alleged tax hinders Commodity Credit Corporation in the efficient exercise of the powers and duties which it was organized to discharge, increase the cost of the service which this instrumentality renders in behalf of the United States Government, deprives it of the power to properly and freely serve the government in the manner intended, is

a direct obstruction to the exercise of federal powers, and violates the immunity of the federal government from taxation by the states. The imposition of the alleged tax on the business and functions of Commodity Credit Corporation in its dealings with Plaintiff was, therefore, unauthorized and unlawful, and Plaintiff is entitled to repayment of same from the Defendant" (R. 4).

To this declaration a demurrer was interposed and sustained, and, on appeal, the judgment affirmed. In short, plaintiff handled for the Credit Corporation, as a warehouseman, Federally licensed, cotton, either (a) storing it, or (b) compressing it, as directed, and for each bale so thus stored or compressed, it received an amount from the Credit Corporation, and on such amount, by the State of Mississippi, was compelled to pay 2% gross, which tax thus imposed augmented the charge made to the Credit Corporation for the service rendered, and was passed to the Credit Corporation, in part, at least.

ARGUMENT.

Point I.

Said Mississippi Tax Statute (Appendix B) contravenes said Federal Statute (Appendix A).

Plaintiff, a duly licensed United States Warehouse, rendered storage and compression services to Credit Corporation and received therefor on each bale a fixed price.

Thereon, this imposition was a privilege tax. Section 1, Chapter 119, Laws Mississippi, 1934, provides:

> "The term 'gross income' means the gross receipts of a taxpayer received as compensation for personal services for the exercise of which a privilege tax is imposed in this state and the gross receipts of the taxpayer derived from trades, business, commerce or sales

and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deductions * * *."

Section 2 of the act is:

"There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the *business activities*, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows: * * *." (Italics ours unless noted otherwise.)

Under 2-f, as amended, Section 6, Chapter 158, Laws 1936:

"Upon every person engaging or continuing within this state in any of the following businesses: * * * cotton compresses, * * * there is likewise hereby levied and shall be collected a tax, *on account of the business engaged in*, equal to two per cent of the gross income of the business."

Section 2-h, as amended by Chapter 222, Laws of 1934, is as follows:

"In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sale, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, * * * or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States."

For each bale stored and each bale compressed by plaintiff, for Credit Corporation, in the discharge of its governmental functions, a privilege tax equaling two per cent of the gross receipts was exacted, which, as admitted by the demurrer, increased the cost to the Credit Corporation, (a) expressly, and (b) impliedly.

Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218, 221, 72 L. Ed. 857, 858, 48 S. Ct. 451, 56 A. L. R. 583; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 75 L. Ed. 1277; *Graves* v. *Texas Company*, 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818.

Division A, as to the rule in Mississippi, under the decision of *State Tax Commission* v. *Brown* (Appendix D) (See Point II, *infra*), assumed to follow *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, where Mississippi's court assumed to say that the majority held:

> "An occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal government, even though the imposition of the tax may increase the cost to the government of the work contracted to be done,"

but this case is clearly, with deference, distinguishable:

1. The Chief Justice said:

> "There is the further suggestion that if the present tax of two per cent is upheld, the State may lay a tax of twenty per cent or fifty per cent or even more, and make it difficult or impossible for the Government to obtain the service it needs. *The argument ignores the power of Congress to protect the performance of the functions of the national government and to prevent interference therewith through any attempted state action.*"

The power of taxation may be utilized for some other purpose, even to the extent of destroying a business. *Sun-*

shine Anthracite Coal Co. v. *Adkins*, — U. S. —, 84 L. Ed. 825, 830; *Alaska Fish, etc., Co.* v. *Smith*, 255 U. S. 48, 65 L. Ed. 495; *Pacific American Fisheries* v. *Alaska*, 269 U. S. 269, 70 L. Ed. 272; *Magnano* v. *Hamilton*, 292 U. S. 40, 78 L. Ed. 1109.

The condition of the country, due to the depression, is a matter whereof this Court takes judicial notice. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413. And likewise how cotton is stored and compressed may likewise be judicially noticed. Compare *Federal Compress & Warehouse Co.* v. *McLean*, 291 U. S. 17, 78 L. Ed. 622, 166 Miss. 739, 147 So. 325. As an instrumentality to alleviate, the Credit Corporation was created, to whom tax immunity was granted in these words:

> "*The Commodity Credit Corporation, including its franchise, its capital* * * * and its income shall be exempt from *all* taxes now or hereafter imposed by * * * any state * * * *except that any real property* of the Commodity Credit Corporation *shall be subject* to state * * * taxation *to the same extent* according to the value *as other real property is taxed*" (Appendix A).

Is this privilege tax admeasured by gross income of plaintiff passed in part to the Credit Corporation in contravention of this exemption?

(a) Thereunder is an express authorization for State taxation, dealing with "the Commodity Credit Corporation, including its franchise, its capital and income" and tax imposition may not be had except upon "real property" "according to its value as other real property is taxed." Hereunder, Congressional authorization of tax imposition is a condition precedent. *Ex Parte Bransford*, — U. S. —, 84 L. Ed. 846; *Colorado National Bank* v. *Bedford*, — U. S. —, 84 L. Ed. 730; *Tradesmens National Bank* v. *Oklahoma Tax Commission*, — U. S. —, 84 L. Ed. 588.

Hence, as to said Credit Corporation, that solely taxable was real estate in accordance with this permission, and before the State might levy, it must coordinate its tax with the permission therefor granted by Congress, pursuant to plenary power thereover exercised. *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. Ed. 265.

(b) As to the Credit Corporation, the immunity is precise.

In *Pittman* v. *Home Owners Loan Corporation*, 308 U. S. 21, 84 L. Ed. 19, 124 A. L. R. 1253, this Court said:

> "We assume here, as we assumed in Graves *v.* New York, 306 U. S. 466, 83 L. Ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466, that the creation of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. M'Culloch *v.* Maryland, 4 Wheat. 316, 421, 422, 4 L. Ed. 579, 605; Smith *v.* Kansas City Title & T. Co., 255 U. S. 180, 208, 209, 65 L. Ed. 577, 588, 589, 41 S. Ct. 243; Graves *v.* New York, supra. Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' M'Culloch *v.* Maryland, supra (4 Wheat. p. 426, 4 L. Ed. 606). This power to preserve necessarily comes within the range of the express power conferred upon Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. 1, Sec. 8, Par. 18. In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the

national field. Shreveport Case (Houston, E. & W. T. R. Co. *v.* United States) 234 U. S. 342, 351, 352, 58 L. Ed. 1341, 1348, 1349, 34 S. Ct. 833. The exercise of this protective power in relation to state taxation has many illustrations. See, e. g., Bank of New York *v.* New York County (New York ex rel. Bank of New York *v.* New York County) 7 Wall. 26, 31, 19 L. Ed. 60, 62; Choate *v.* Trapp, 224 U. S. 665, 668, 669, 56 L. Ed. 941, 943, 32 S. Ct. 565; Smith *v.* Kansas City Title & T. Co., supra (255 U. S. p. 207, 65 L. Ed. 588, 41 S. Ct. 243); Trotter *v.* Tennessee, 290 U. S. 354, 356, 78 L. Ed. 358, 259, 54 S. Ct. 138; Lawrence *v.* Shaw, 300 U. S. 245, 249, 81 L. Ed. 623, 626, 57 S. Ct. 443, 108 A. L. R. 1102. In this instance, Congress has undertaken to safeguard the operations of the Home Owners' Loan Corporation by providing the described immunity. As we have said, we construe this provision as embracing and prohibiting the tax in question. Since Congress had the constitutional authority to enact this provision, it is binding upon this Court as the supreme law of the land. Const. Art. 6."

Approved, *Tradesman Nat. Bank* v. *Oklahoma Tax Commission*, — U. S. —, 84 L. Ed. 591.

In *Federal Land Bank of New Orleans* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 705, Mr. Justice Holmes said:

> "The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so, it cannot say that it leaves the bank free to record or not. The bank has a choice, it is true, but so has one who acts under duress. The Eliza Lines, 199 U. S. 119, 131, 50 L. Ed. 115, 120, 26 Sup. Ct. Rep. 8, 4 Ann. Cas. 406.
>
> "The state is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its courts in cases which

those courts are otherwise competent to entertain. Kenney *v.* Supreme Lodge, L. O. M. 252 U. S. 411, 415, 64 L. Ed. 638, 640. 10 A. L. R. 716, 40 Sup. Ct. Rep. 371. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

"Of course, the state is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. *v.* Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. Rep. 377. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the supreme court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the supreme court, as distinguished from the interpretation of it, does not bind this court. St. Louis Southwestern R. Co. *v.* Arkansas, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99; St. Louis Cotton Compress Co. *v.* Arkansas, December 4, 1922 (260 U. S. 346, ante, 297, 43 Sup. Ct. Rep. 125). It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax; but, whoever pays it, it is a tax upon the mortgage, and that is what is forbidden by the law of the United States."

(c) Statutes of this nature have been uniformly construed as imposing a tax on the ultimate consumer or user. *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 76 L. Ed. 1232; *McGoldrick* v. *Berwind-White Coal Mining Co.,* — U. S. —,

84 L. Ed. 343, and when, though authorized, there was a specific immunization, this type of taxation could not be collected. *McGoldrick* v. *Compagnie General Transatlantique*, — U. S. —, 84 L. Ed. 602; *McGoldrick* v. *Gulf Oil Corporation*, — U. S. —, 84 L. Ed. 597.

Of this tax, it was said by its creator, Governor Connor:

> "The retail sales tax is not a tax upon business, except insofar as business elects to make it so. It was never intended to be other than a consumption tax, to be passed on to the purchaser. One of the chief purposes of the sales tax is to decrease the tax burden by broadening the tax base. There are today in Mississippi thousands of people who pay no taxes, but who enjoy all the rights and privileges of citizenship. These people will be glad of an opportunity to have a share in the responsibility of maintaining the government of the state in which they live. Surely it will not be seriously argued that a contribution to the state of only $2.00 on $100.00 of purchases is a hardship upon anybody."

Therein, this Court has substantially concurred. Compare *Crawford* v. *Hubbell*, 89 Fed. 961, 177 U. S. 419, 44 L. Ed. 829; *American Express Co.* v. *Maynard*, 77 N. W. 320, 118 Mich. 682, where, upon appeal, Mr. Justice White, 177 U. S. 404, reversed the decision and sustained the right to thus pass the tax. See *Dinsmore* v. *Southern Express Co.*, 102 Fed. 794, 805, 183 U. S. 115.

By this Tax Statute, an imposition has been made on the Credit Corporation, and that which would have been income has been specifically diverted, so that this agency, created to effectuate the definite purpose, has had that purpose thwarted to the extent of the imposition accruing from the tax here, which inheres in the business relation between plaintiff and the Credit Corporation and is imposed solely and exclusively therefor.

Mississippi's Court has not construed this particular section, but where there has been a sale of tangible personal property, Mississippi's legislature has made it mandatory that the tax be specifically passed, leaving, however, the parties free to pass the other impositions, which admittedly has been done herein.

Compare *Woodrich* v. *St. Catherine Gravel Co.*, 195 So. 307; *State ex rel.* v. *Allen*, 180 Miss. 659, 177 So. 763; *Notgrass Drug Co.* v. *State*, 175 Miss. 358, 165 So. 884; *Southern Package Corp.* v. *State Tax Commission*, 164 So. 45, 174 Miss. 212. As to the operations of a somewhat similar tax, compare *McGoldrick* v. *Compagnie General Transatlantique*, — U. S. —, 84 L. Ed. 602; *McGoldrick* v. *Gulf Oil Corporation*, — U. S. —, 84 L. Ed. 597.

In *James Stewart & Co.* v. *Sadrakula*, — U. S. —, 84 L. Ed. 375, the majority of the Court said:

> "But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

2. Therein, 82 L. Ed. 167, 302 U. S. 150, the Chief Justice said:

> "The observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without duly limiting the taxing power which is equally essential to both nation and state under our dual system,"

and declared:

> "The tax is not laid upon a contract of the Government,"

citing as still operative in that aspect: *Osborn v. Bank of United States*, 9 Wheat. 867, 6 L. Ed. 234; *Weston* v.

Charleston, 2 Pet. 449, 468, 475, 7 L. Ed. 481, 488, 490; * * * *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 67 L. Ed. 703; * * * *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 222, 72 L. Ed. 857, 858; * * * *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 574, 75 L. Ed. 1277, 1280, * * * *Graves* v. *Texas Co.,* 298 U. S. 393, 401, 80 L. Ed. 1236, 1242."

The West Virginia statute made the imposition "Upon every person engaging or continuing within this State in the business of contracting, the tax shall be equal to two per cent. of the gross income of the business", but in Mississippi the tax is "*on account of the business activities*", which is again reiterated 2-f, "on account of the business engaged in", thus bringing Mississippi's statute under these differentiated cases.

Note, further, that the *Dravo* case applies *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 460, 26 L. Ed. 1067, where there was condemned a tax of a specific amount on each message sent by the officers of the United States, and, thereunder, were reviewed the decisions of this Court from *Brown v. Maryland,* to date. This tax is of a specific amount on account of the business done, and confessedly, is on the Credit Corporation, which is specifically immunized.

Further, in the *Dravo* case, there is reviewed *Alward* v. *Johnson,* 282 U. S. 509, 514, 75 L. Ed. 496, 499, and thereof it was said:

> "In upholding the tax upon his gross receipts we distinguished Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, *supra,* saying: 'There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely. * * * The facts in Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, and New Jersey Bell Teleph. Co. v. State Bd. of Taxes and Assessments,

280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

3. Furthermore, as correctly stated by the Chief Justice, 82 L. Ed. 171, 302 U. S. 158:

> "Respondent has no constitutional right to immunity from non-discriminatory local taxation and the mere fact that the tax in question burdens respondent is no defense. The defense is that the tax burdens the Government and respondent's right is at best a derivative one. He asserts an immunity which, if it exists, pertains to the Government and which the Government disclaims."

And in the *Dravo* case, it was expressly stipulated (82 L. Ed. 172, 302 U. S. 159):

> "Respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond and property taxes,' "

but herein, there is no such intimation, and the exaction does augment and has been passed to the Credit Corporation, which is unable to avoid it, because this corporation, at that place, is the sole Federal Warehouse where such rendition of service may be had, and thus, the Credit Corporation must be taxed contrary to that specifically thereasto provided in Appendix A.

It is true that where Congress has not made any such express immunization as here occurs, this Court has subsequently sustained a non-discriminatory net income tax covering officers of the United States. Compare *Graves*

v. *New York*, 306 U. S. 466, 83 L. Ed. 927; *Helvering* v. *Gerhardt*, 304 U. S. 405, 83 L. Ed. 1427. Under these cases, there is no constitutional immunity, but there is a power in Congress to immunize, which, when exercised, is operative to make effective that which precedently was held to immunize under the Constitution, *per se*.

4. As further condemnatory of this act, we direct attention to the review of the authorities in this Court by the dissenting opinion in the *Dravo* case, by Mr. Justice Roberts.

POINT II.

The immunity of the Commodity Credit Corporation under the Commodity Credit Corporation Act (Appendix A), approved March 8, 1938, must have thereinto integrated, to effectuate the intent of Congress, the decisions of this Court then (March 8, 1938) existent and controlling. This Court by a change of decision since March 8, 1938, is powerless to amend by judicial legislation this Act of Congress and thereby change the immunization granted at the time of its enactment.

But if plaintiff errs as to the present law, yet, the immunizing act was passed March 8, 1938, whereinto were integrated the controlling decisions then existent by this Court, and judicial legislation amending this statute is not permissible, and therefore the immunities then vouchsafed by the decisions of this Court were thereinto integrated and may not be therefrom judicially deleted.

As a preface, the case of *Mississippi Tax Commission* v. *Brown*, 193 So. 795, was decided by Division A of Mississippi's Supreme Court, composed of Chief Justice Smith, Anderson and Griffith, Associate Justices, January 29, 1940. Pursuant to Section 145 of Mississippi's Constitution (Appendix E), the court is composed of six members, Division B being Presiding Justice Ethridge, McGowan and McGehee. Upon February 19, 1940, before the judgment

herein became final, that court, in banc, decided *Mississippi State Tax Commission* v. *Brown*, 193 So. 795, — Miss. — (Appendix D), wherein it construed Chapter 120, Laws of Mississippi, 1934, the act here in question being Chapter 119 and approved approximately at the same time, and before the decision fundamentally altering the principles announced in this Court and then operative through its decisions.

Mississippi's court then cited many cases from this Court, running back 100 years and more, among them, *Gillespie* v. *Oklahoma*, 257 U. S. 501, 66 L. Ed. 338, wherein it quoted to approve,

> "A state may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian lands from sales of his share of oil and gas received under his leases."

And then Presiding Justice Ethridge said:

> "All the decided law, therefore, at the time of the enactment of the statute here involved was to the effect that Federal instrumentalities were not taxed, and could not be taxed without the consent of Congress. And we must assume that the legislature enacted the statute here involved in the light of these decisions, and intended to conform to them; and its action must be interpreted in the light of these decisions.
>
> "The legislature cannot be held to foresee that the Court would change its decisions, and legislative acts cannot be rightfully interpreted in the light of decisions rendered after the enactment of the statute."

Mississippi's court, in so doing, assumed to follow the law as at that time established by this Court, that is, at the date of the enactment, March 8, 1938, quoting to approve 25 R. C. L. 959, Section 215, as follows:

> "In 25 R. C. L., 959, section 215, under heading, 'Meaning to be Given as of Time of Enactment,' it is said, 'There is always a tendency, it has been said, to

construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience. The true rule is that statutes are to be construed as they were intended to be understood when they are passed;' citing United States *v.* Union Pacific R. Co., 91 U. S. 72, 23 L. Ed. 224; Schuyler County *v.* Thomas, 98 U. S. 169, 25 L. Ed. 88; Com. *v.* Erie & N. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471; Platt *v.* Union P. R. Co., 99 U. S. 48, 63, 25 L. Ed. 424; Bloomer *v.* Todd, 3 Wash. T. 599, 19 P. 135, 1 L. R. A. 111; see, also, People *v.* Barnett, 319 Ill. 403, 150 N. E. 290; State *v.* Boston, etc., R. Co., 123 Me. 48, 121 A. 541."

That court then reviewed divers decisions in this Court, and interpreting them, held that Congress could not be held "to foresee that the Court would change its decisions, and legislative acts cannot be rightfully interpreted in the light of decisions rendered after the enactment of the statute."

So here, this enactment of March 8, 1938, may not be altered by judicial legislation from that then intended by Congress, for into that statute were integrated each of the decisions then existent, as well as similar broad exemptions given similar governmental agencies.

Gelpcke v. *Dubuque,* 1 Wall. (U. S.) 175, 206, 17 L. Ed. 520; *Ohio Life Ins. & Trust Co.* v. *Debolt,* 16 How. (U. S.) 416, 432, 14 L. Ed. 997; *Havemeyer* v. *Iowa County,* 3 Wall. (U. S.) 294, 303, 18 L. Ed. 38; *Wisconsin Lumber Co.* v. *State,* 97 Miss. 571, 578, 54 So. 247; *Bank of Philadelphia* v. *Posey,* 130 Miss. 825, 95 So. 134.

So when this immunity existed under the *Dravo* case, it was the intention of Congress to put into this statute that then said to be the true interpretation of the Constitution. When Congress so did, this Court, without the consent of Congress, may not, with deference, by a subsequent change in its rulings, alter that thus into the statute integrated by Congress. In short, there may not be, by a change of decision, a subversion of Congressional intention placed in a

statute at the time it was enacted. If Congress, as it may, desires to repeal, it may so do, but until it does, the interpretation of the statute must remain uniform.

(a) This Court, by a majority, in the *Dravo* case, said:

> "The tax is not laid upon the Government, its property or officers. Dobbins *v.* Erie County, 16 Pet. 435, 449, 450, 10 L. Ed. 1022, 1027, 1028."

Graves v. *New York*, 306 U. S. 466, 83 L. Ed. 927, which overruled *Dobbins* v. *Erie County*, was not decided until March 27, 1939. So that, until 1939, Congress, in passing its acts, was authorized to assume, and, with deference, did assume that those decisions then outstanding as expositions of the Constitution, admeasured the rights thereunder by Congress declared and intended so to be.

(b) The *Dravo* case further said:

> "The tax is not laid upon the contract of the Government", citing therefor *Osborn* v. *Bank of United States*, 9 Wheat. 867, 6 L. Ed. 234; *Weston* v. *Charleston*, 2 Pet. 449, 468, 475, 7 L. Ed. 481, 488, 490; and especially, *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464, 466, 26 L. Ed. 1067, 1068, 1069; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 67 L. Ed. 703, 29 A. L. R. 1; *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 222, 72 L. Ed. 857, 858; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 574, 75 L. Ed. 1277, 1280; *Graves* v. *Texas Co.*, 298 U. S. 393, 401, 80 L. Ed. 1236, 1242, and it was

there held, citing the *Weston* case and others,

> "Taxes on interest from government securities were held to be laid on the government's contract—upon the power to borrow money—and hence were invalid,"

which was before Congress when this statute was passed.

(c) *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. Ed. 1067, is cited, where it is said:

> "In this the court but applied the rule, announced in Brown *v.* Maryland, 12 Wheat., 444, that where the

burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are Welton *v.* Missouri, 91 U. S. 275 (XXIII, 347); Cook *v.* Pennsylvania, 97 U. S. 566 (XXIV, 1015), and Webber *v.* Virginia (ante, 565). And in Passenger Cases, 7 How., 283; Crandall *v.* Nevada, 6 Wall., 35 (73 U. S. XVIII, 745), and Henderson *v.* Mayor of N. Y., 92 U. S. 259 (XXIII, 543), taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers; and in State Tonnage Cases, 12 Wall., 204 (79 U. S. XX, 370); Peete *v.* Morgan, 19 Wall., 581 (86 U. S., XXII, 201); Cannon *v.* New Orleans, 20 Wall., 577 (87 U. S. XXII, 417), and Steamship Co. *v.* Tinker, 94 U. S. 238 (XXIV, 118), that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage."

See, also, *Leloup* v. *Mobile*, 127 U. S. 640, 32 L. Ed. 311 and *Williams* v. *Talladega*, 226 U. S. 404, 57 L. Ed. 275.

(d) "In Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, supra, and Indian Motocycle Co. *v.* United States, 283 U. S. 570, 75 L. Ed. 1277, 51 S. Ct. 601, supra, the taxes were held to be invalid as laid on the sales to the respective governments, the one being a state tax on a sale to the United States, and the other a federal tax on the sale to a municipal corporation of Massachusetts. A similar result was reached in Graves *v.* Texas Co., 298 U. S. 393, 80 L. Ed. 1236, 56 S. Ct. 818, supra. These cases have been distinguished and must be deemed to be limited to their particular facts."

Thus, this immunization was consciously present with Congress when this act was passed, and in *Alward* v. *Johnson*, 282 U. S. 509, 514, 75 L. Ed. 496, 499, 51 S. Ct. 273, 75

A. L. R. 9, further reference was made to the *Panhandle Oil* case, thus:

> "There was no tax upon the contract for such carriage; the burden laid upon the property employed affected operations of the Federal Government only remotely * * * The facts in Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 72 L. Ed. 857, 48 S. Ct. 451, 56 A. L. R. 583, and New Jersey Bell Telph. Co. *v.* State Bd. of Taxes & Assessments, 280 U. S. 338, 74 L. Ed. 463, 50 S. Ct. 111, were held to establish direct interference with or burden upon the exercise of a Federal right. The principles there applied are not controlling here."

(e) In *Metcalf* v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384, the differentiation between a net income tax and a gross income tax was pointed out.

> "In Thomson *v.* Union P. R. Co., 9 Wall. 579, 19 L. Ed. 792, supra, the Court pointedly referred to the authority of Congress to prevent such an interference through the use of taxing power of the State. 'It cannot,' said the Court, 'be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.' See Van Allen *v.* Assessors (Churchill *v.* Utica) 3 Wall. 573, 585, 18 L. Ed. 229, 235; Fidelity & D. Co. *v.* Pennsylvania, 240 U. S. 319, 60 L. Ed. 664, 36 S. Ct. 298, supra."

We likewise, with deference, refer to the cases collated by Mr. Justice Roberts in his dissenting opinion:

(1) *M'Culloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. Ed. 579, 608;

(2) *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 465, 26 L. Ed. 1068;

(3) *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218, 221, 72 L. Ed. 857, 858, 48 S. Ct. 451, 56 A. L. R. 583;

(4) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 75 L. Ed. 1277, in addition to many others, and, therefore, with deference, we have substantially a unanimous Court, as at that date, recognizing the existence of a limited constitutional immunity, which Congress made applicable as at March 8, 1938 and these decisions thus delineating Federal power were those whereto Congress necessarily adverted in making this immunity, and until Congress changes that which it thus established, with deference, this Court may not legislatively amend a Congressional immunization. Possibly, due to the holding of Division A of the Mississippi Court, it is obligatory upon this Court to make operative this latest decision thereasto in Mississippi under the Constitution as interpreted by Mississippi. *Wisconsin Lumber Co.* v. *State*, 97 Miss. 571. And failing therein, this Court should so thus do.

WHEREFORE, it is respectfully submitted that, as properly interpreted, the Credit Corporation Act, immunizing this transaction from this State taxation, but if therein we err, then as at March 8, 1938, Congress intended to make operative by Appendix A, the immunity from this State tax, Appendix B, then existing under the decisions of this Court, and this Court, with deference, by a change in decision not then to be foreseen, may not presently judicially legislate to amend the intention of Congress existent when the statute was approved.

Respectfully,

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APPENDIX A.

Page 27, Pocket Edition, 15 U. S. C. A., Commerce and Trade.

SECTION 713a-5. *Same; exemption of corporation and its obligations from taxation.*

Bonds, notes, debentures, and other similar obligations issued by the Commodity Credit Corporation under the provisions of this Act * shall be deemed and held to be instru-

* Sections 713a-1 through 713a-5 of this title.

mentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). The Commodity Credit Corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the Commodity Credit Corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. Mar. 8, 1938, c. 44, Section 5, 52 Stat. 108.

APPENDIX B.

Chapter 119, Laws Mississippi, 1934.

HOUSE BILL No. 70.

AN ACT to provide for the raising of additional public revenue by imposing a tax upon the privilege of engaging in certain businesses in Mississippi, to provide for the ascertainment, assessment and collection of said taxes; to provide penalties for the violation of the terms of this act and to repeal chapters 90 and 91 of the laws of Mississippi of 1932.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That this act may be cited as the emergency

revenue act of 1934. When used in this act, the term "person" or the term "company" herein used interchangeably, includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

Definitions.

The term "tax commission" means the state tax commission of the State of Mississippi.

The word "commissioner" when used in this act, means the chairman of the state tax commission.

The term "tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commission to use same as the tax period in lieu of the calendar year.

The term "sale" or "sales" includes the barter or exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

The word "taxpayer" means any person liable for any tax hereunder.

The term "gross income" means the gross receipts of a taxpayer received as compensation for personal services for the exercise of which a privilege tax is imposed in this state and the gross receipts of the taxpayer derived from trades, business, commerce or sales and the value proceeding or accruing from the sale of tangible property (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deductions on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expense whatsoever; and without any deduction on account of losses.

The term "business" when used in this act shall include all activities or acts engaged in (personal, professional and corporate) or caused to be engaged in with the object of gain, benefit, or advantage either direct or indirect, and

not exempting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.

The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible property without any deduction on account of the cost of property sold, expenses of any kind, or losses; provided, however, that cash discounts allowed and taken on sales shall not be included as gross income. But the words "gross income" and "gross proceeds of sales" shall not be construed to include goods, wares or merchandise, or the value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale price of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the "gross income" or "gross proceeds of sales" as the case may be.

The term "engaging" as used in this act with reference to engaging or continuing in business shall also include the exercise of corporate or franchise powers.

The term "auditor" as used in this act means the auditor of public accounts of the state of Mississippi.

Tax Levied.

Sec. 2. There is hereby levied and shall be collected annual privilege taxes, measured by the amount or volume of business done, against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values, or gross income, or gross proceeds of sales, as the case may be, as follows:

Upon Whom Levied

Sec. 2-a. Upon every person engaging or continuing within this state in the business of mining, quarrying, drilling or otherwise producing for sale, profit, or commercial use, any oil, natural gas, limestone, sand, gravel, or other mineral or natural resource products, and upon every person engaging or continuing within this state in the business of felling and producing timber for sale, profit or commercial use, or buying, logging or selling timber for commercial

purposes, the amount of such tax to be equal to the value of the articles produced, as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided), multiplied by the respective rates as follows:

Oil, two per cent; natural gas, two and one-half per cent; limestone, sand, gravel, or other mineral products, two per cent; timber, two per cent.

Provided, however, that only persons engaged principally in the business of felling and producing timber for sale, profit, or commercial use, or buying, logging and selling timber for commercial purposes (except as otherwise provided in this act), shall be required to pay the tax levied in this section for the privilege of engaging in the business of felling and producing timber for sale, profit, or commercial use, or logging and selling timber for commercial purposes.

The measure of this tax is the value of the entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside the state.

If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed in this section shall be due and payable as of the date of such removal from the state, whether said products have been sold or not.

In computing the tax levied under this section, where the gross proceeds of sales of such natural resource products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual freight charges prepaid by the taxpayer or included in the invoice price, on such natural resource products, to the place of delivery, shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

Provided, however, that any person engaging in the business of mining or producing timber, minerals or other natural resource products (excepting, however, oil and gas), who shall use such minerals, timber or other natural resource products, for the purpose of manufacturing, compounding or preparing the same for sale as manufactured products, in mills or plants located in this state and taxable under section 2-b of this act, shall not be required to make returns, or to pay the tax levied in this section, on account of the production of such minerals, timber, or other natural resource products, where the value of such products is included in the measure of the tax levied upon and collected from the taxpayer under section 2-b of this act. And, likewise, any person engaging in the business of mining or producing timber, minerals, or other natural resource products (excepting, however, oil and gas), who shall sell such minerals, timber, or other natural resource products to a person engaged in the business of manufacturing, compounding or preparing such products for sale, as manufactured products, in mills or plants located in this state and taxable under section 2-b of this act, shall not be required to include in the measure of the tax imposed in this section any gross proceeds derived from the sale of such minerals, timber, or other natural resource products (excepting, however, oil and gas), to persons taxable under section 2-b of this act; but such person shall be required to make a proper return showing the amount of the gross proceeds of such sales and the persons to whom such products were sold.

Provided, further, that any person exercising any privilege taxable under any other section of this act, who produces minerals, timber or other natural resource products, the production of which is taxable under this section, and who uses or consumes the same in his business, so that the gross income or gross proceeds of sales from such business does not include the value of such natural resource products thus used or consumed, shall be deemed to be engaged in the business of mining and producing minerals, timber or other natural resource products for sale, profit or commercial use, and shall be required to make returns on account of the production of such minerals, timber or other

natural resource products, thus used or consumed, and to pay the tax imposed in this section for the privilege of engaging in the business of producing such natural resource products, and such tax shall be measured by the value of the products thus produced and the commissioner shall prescribe uniform and equitable rules for ascertaining such value.

The tax imposed in this section upon persons engaged in the business of mining or producing, for sale, profit or commercial use, oil or natural gas, shall be collected by the commissioner, in the manner provided in this act, from the person in charge of the production operations, and the commissioner is hereby authorized to make such investigations and inspections of the production operations, from time to time, as he may deem necessary for the purpose of ascertaining the correct amount of the tax due.

Sec. 2-b. Upon every person engaging or continuing within this state in the business of manufacturing, compounding, or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances, or commodities, manufactured, compounded, or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

Manufacturers of brick, drain tile, building tile, sewer pipe, portland cement and portland cement products and clay products, one per cent; manufacturers of bottled soft drinks, one per cent; ice factories, one-fourth of one per cent; cotton seed oil mills, one-fourth of one per cent; manufacturers of feed and feed stuffs, one eighth of one per cent; all other manufacturers on whose gross income a tax is not otherwise levied in this act, one-fourth of one per cent.

The measure of this tax is the value of the entire product manufactured, compounded, or prepared, in this state, for sale, profit or commercial use, regardless of the place of

sale or the fact that deliveries may be made to points outside the state.

If any person liable for any tax under this section shall ship or transport his products, or any part thereof, out of this state without making sale of such products, the value of the products in the condition or form in which they existed immediately before transportation out of the state shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed in this section shall be due and payable as of the date of such removal from the state, whether said products have been sold or not.

In computing the tax levied under this section, where the gross proceeds of sales of such natural resource products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual freight charges prepaid by the taxpayer or included in the invoice price, on such natural resource products, to the place of delivery, shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

Where delivery of any products is made by a producer, taxable under this section, to other affiliated companies or persons, or under other circumstances where the relation between the producer and the receiver of such products is such that the consideration paid, if any, is not indicative of the true value of the products delivered, the producer shall pay the tax imposed by this section for the privilege of engaging in the business of producing the products so delivered, measured by the value, corresponding as nearly as possible to the gross proceeds of sale of similar products, of like quality and character, by other taxpayers, where no common interest exists between the buyer and seller but the circumstances and conditions are otherwise similar.

Sec. 2-c. Upon every person engaging or continuing within this state in the business of selling any tangible property whatsoever, real or personal (not including, however, bonds or other evidence of indebtedness, or stocks), there is likewise hereby levied, and shall be collected, a tax

equivalent to two per cent of the gross proceeds of sales of the business; provided, however, that, in the case of a wholesaler or jobber, the tax shall be equal to one-eighth of one per cent of the gross proceeds of sales of the business; and provided, further, that, in the case of an automobile dealer or agent the tax shall be equivalent to one per cent of the gross proceeds of sales of automobiles or trucks and tractors, including the value of any evidence of debt of any nature whatsoever, which may be sold or discounted by the dealer, and if so sold to one who is liable for the payment of a privilege tax under this act the amount of such privilege tax shall be based on the interest or discount paid or collected thereon.

Provided, further, that in the case of dealers in fluid milk that is perishable in twenty-four hours and commonly known as pasteurized milk, the tax shall be equivalent to one per cent of the gross proceeds of the sale of said milk.

The classification of "wholesaler" or "jobber" shall apply only to a person doing a regularly organized wholesale or jobbing business, known to the trade as such, selling only to licensed retail merchants or jobbers, for purposes of resale.

Provided, however, that any person engaging or continuing in business as a retailer and a wholesaler or jobber shall pay the tax required on the gross proceeds of sales of each such business at the rates specified, when his books are kept so as to show separately the gross proceeds of sales of each business; and when his books are not so kept he shall pay the tax as a retailer; and provided, further, that any such person engaging or continuing in business as a retailer and as a wholesaler or jobber shall pay the tax as a retailer on the gross proceeds of sales derived from all sales made by him to any person other than a licensed merchant purchasing for resale in the regular course of business.

A person exercising any privilege taxable under section 2-a or section 2-b of this act and engaging in the business of selling his natural resource products or manufactured products at retail in this state shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in this section, for the privilege of engag-

ing in the business of selling such natural resource or manufactured products at retail in this state; and the value, or gross proceeds of sales, of such natural resource or manufactured products, thus sold by the producer at retail and included in the measure of the tax imposed in this section, shall be deducted from the gross income, or gross proceeds of sales, used in determining the measure of the tax imposed upon such producer or manufacturer in said section 2-a or said section 2-b of this act.

But any person exercising any privilege taxable under section 2-a or section 2-b of this act and engaging in the business of selling his natural resource products or manufactured products to manufacturers, wholesalers, jobbers, or licensed retailers, shall not be required to pay the tax imposed in this section for the privilege of selling such natural resource products or manufactured products at wholesale. Nor shall any person exercising any privilege taxable under section 2-a or section 2-b of this act be required to pay the tax imposed in this section for the privilege of selling his natural resource products or manufactured products for delivery outside of this state. But the gross income derived from the sale of such natural resource products, or manufactured products, to manufacturers, wholesalers, jobbers or licensed retailers, and the gross income derived from all sales of such natural resource products, or manufactured products, for delivery outside of this state, shall be included in determining the measure of the tax imposed upon such producer or manufacturer in said section 2-a or said section 2-b of this act.

Sec. 2-d. Upon every person engaged or continuing within this state in the business of owning or operating a water or public sewerage system, or owning or operating a street railway for the transportation of freight or passengers for hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of furnishing to consumers, electricity, electric lights, current, power or gas, natural or artificial, there is likewise hereby levied and shall be collected a tax,

on account of the business engaged in, equal to one per cent of the gross proceeds of the business, when such electricity, electric lights, current, power or gas is sold for industrial purposes, and a tax, on account of the business engaged in, equal to two per cent of the gross proceeds of the business when such electricity, electric lights, current, power or gas is sold for any other purpose.

Upon every person engaging or continuing within this state in the business of owning or operating a telegraph business, or owning or operating a telephone business for the transmission of messages or conversations between points within this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a railroad for the transportation of freight or passengers for hire between points within this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a sleeping or palace car business, carrying passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating an express business, transporting freight or passengers from one point to another in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating a pipe line for transporting from one point to another in this state oil or natural gas or artificial gas through pipes or conduits in this state, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business.

Upon every person engaging or continuing within this state in the business of operating motor vehicles on the

public highways of this state, between fixed termini, or over a regular route, for the transportation of persons or property for compensation or hire, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business; but such tax shall not apply to persons engaged in transporting school children under contract with counties or school districts.

There shall be excepted from the gross income used in determining the measure of the tax imposed in this section so much thereof as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, which the state of Mississippi is prohibited from taxing under the constitution of the United States of America. And nothing contained in this section shall be construed to levy a tax upon the operation by municipal corporations of any electric or water system owned by the municipality operating it.

Sec. 2-e. Upon every person engaging or continuing within this state in the business of contracting, as defined in the privilege tax law of this state, and amendments thereto, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to one per cent of the gross income of the business.

2-f. Upon every person engaging or continuing within this state in any business, profession, trade, or calling, subject to a privilege tax under the privilege tax law of this state and not included in the preceding sections, excepting, however, persons specifically exempted from the provisions of this act in section 4 hereof, there is likewise hereby levied and shall be collected a tax, equal to two per cent of the gross income of any such business.

Provided, however, that in computing the tax levied under this section, if the taxpayer is a natural person there shall be deducted from the gross income of the taxpayer, so to be taxed, so much thereof as has been received by him as compensation for personal services rendered by him in person to others for a consideration (as distinguished from gross income received by the taxpayer as a result of the activities of his employees or other persons or gross in-

come or gross proceeds of sales derived from the production or sale of tangible property), Provided, however, that if any person exercising any privilege taxable under this section shall engage in any business activities which are taxable under any of the preceding sections of this act and shall be liable on account of such business activities for the payment of a tax under any such preceding section, no deduction shall be allowed in determining the measure of the tax imposed in such preceding section.

Sec. 2-g. When any person is engaged in two or more forms of business activities taxable under the provisions of this act, which are inter-related, or which are of like character, such person shall file a consolidated return covering all business activities, which are thus inter-related or of like character.

Sec. 2-h. In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States.

Sec. 2-i. And in computing the amount of tax levied under this act, there shall also be excepted from the gross income of the business, or gross proceeds of sales, as the case may be, all sums received or collected as taxes on admissions, and all sums received or collected as taxes on the sale of tobacco, gasoline and oils.

Must Obtain License from the Commissioner.

Sec. 3. If any person shall engage or continue in any business for which a privilege tax is imposed by this act, as a condition precedent to engaging or continuing in such business, he shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar, a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the tax accruing to the state of Mississippi under the provisions of this act;

and he shall thereby be duly licensed to engage in and conduct such business. Said license shall be renewed annually, and shall expire on the 30th day of April next succeeding the date of its issuance.

Certain Persons Exempt from Provisions.

Sec. 4. There are, however, exempted from the provisions of this act:

(a) Insurance companies which pay the state of Mississippi a tax upon premiums levied under the provisions of the laws of the state of Mississippi, persons paying a tax under the sea foods act, and persons paying a tax under the amusement revenue act of 1934.

(b) Building and loan associations, state and national banks, and mutual savings banks, not having a capital stock represented by shares and which are operated exclusively for the benefit of their depositors.

(c) Labor, agricultural and horticultural organizations not operated for profit, and agricultural or cooperative associations organized under chapter 99 of the code of Mississippi of 1930.

Provided, however, that if any such organization shall receive any gross income or gross proceeds of sales from persons other than members of such organization, such organization shall be taxable under the provisions of this act on account of such business activities engaged in with persons other than members of such organization, and shall be required to pay the tax imposed under this act for the privilege of engaging in such business activities with persons other than members of such organization, and such tax shall be measured by the gross income or gross proceeds of sales received by such organization from persons other than members of such organization. And the books of such organization shall be so kept as to show separately that part of the gross income or gross proceeds of sales derived from members and that part of the gross income or gross proceeds of sales which is derived from transactions with non-members, and when the books of such organization are not so kept, such tax shall be measured by the gross income

or gross proceeds of sales received by such organization from transactions with all persons, whether members or non-members.

(d) Fraternal benefit societies, orders or associations operating under the lodge system, or for the exclusive benefit of the members of the fraternity itself, operating under the lodge system, and providing for the payment of death, sick, accident or other benefits to the members of such societies, orders or associations, and to their dependents.

(e) Corporations, associations or societies organized and operated exclusively for religious, charitable, scientific or educational purposes.

(f) Cemetery associations.

(g) Business leagues, chambers of commerce, boards of trade, civic leagues and organizations operated exclusively for the benefit of the community and for the promotion of social welfare, and from which no profit inures to the benefit of any private stockholder or individual.

(h) Hospitals, infirmaries and sanataria.

There are also exempted and excepted from the provisions of this act:

(i) The gross proceeds of sales of cotton, whether lint cotton or seed cotton, baled cotton, whether compressed or not, and cotton seed in its original condition.

(j) Amounts received under life insurance policies and contracts paid by reason of the death of the insured.

(k) Amounts received (other than amounts paid by reason of death of the insured) under life insurance endowment or annuity contracts, either during the term or at maturity, or upon surrender of the contract.

(l) Amounts received from the sale of school books where the sale price is fixed by state contract.

(m) Sales of all fertilizer, seeds, boxes and crates used in preparing agricultural products for market.

(n) The gross proceeds of sales made by persons who produce live stock, poultry and other products of farm, grove or garden, when said sales are made by the producer, or members of his immediate family, or employees selling such products for the producer, in the original state or condition of preparation for sale at the place of production, and before such products are subjected to any other process coming within a class of business, the privilege of conducting which is taxed by the provisions of this act.

But nothing in this act shall be construed as levying any tax upon the gross proceeds received by any person whomsoever from the sale of any cotton or seed cotton or lint cotton or baled cotton, whether compressed or not, or cotton seed in its original condition.

SEC. 5. The taxes levied hereunder shall be due and payable in monthly installments, on or before the 15th day of the month next succeeding the month in which the tax accrues. The taxpayer shall, on or before the 15th day of the month make out a return, showing the amount of the tax for which he is liable, for the preceding month, and shall mail the same together with a remittance, in the form required by section 13 of this act, for the amount of the tax, to the office of the commissioner. Such monthly return shall be signed by the taxpayer or a duly authorized agent of the taxpayer, but need not be verified by oath.

Provided, however, that when the total tax for which any person is liable under this act, does not exceed the sum of ten dollars ($10.00) for any month, a quarterly return and remittance in lieu of the monthly return may be made on or before the 15th day of the month next succeeding the end of the quarter for which the tax is due.

Provided, however, that any person taxable under this act, having cash and credit sales, may report such cash and credit sales separately, and upon making application therefor may obtain from the commissioner an extension of time for the payment of taxes due on account of such credit sales. Such extension shall be granted by the commissioner, under such rules and regulations as the commissioner may prescribe. When such extension is granted, the taxpayer shall thereafter include in each monthly report all collections

made during the month next preceding, and shall pay the taxes due thereon at the time of filing such report. But, in no event, unless otherwise expressly provided in this act, shall the gross proceeds of credit sales be included in determining the measure of the tax to be paid until the amounts owing to the taxpayer on account of such credit sales shall have been collected.

Provided, however, that in cases where an extension of time for the payment of taxes due on account of such credit sales shall be granted by the commissioner and the taxpayer shall thereafter discontinue the business in relation to which such extension of time shall have been granted, such taxpayer shall be required to file with the commissioner, within ten days, or such further time as the commissioner may direct, from the date of the discontinuance of such business, a special report, showing the amounts of such credit sales which have not been included in determining the measure of the tax theretofore paid and such other information with reference to such credit sales as the commissioner may require; and the commissioner shall thereupon investigate the fact with reference to such credit sales and the condition of the accounts therefor, and shall determine, from the best evidence available, the value of all notes, open accounts or other evidences of debt arising out of such credit sales; and the value of such notes, open accounts and other evidences of debt, as thus determined by the commissioner, shall be used in determining the amount of the tax for which such taxpayer shall be deemed to be liable on account of such credit sales. When the amount of such tax shall have been ascertained in the manner herein provided, the taxpayer shall be required to pay the same within ten days, or such further time as the commissioner may allow, notwithstanding the fact that such notes or accounts may still remain uncollected.

The monthly, quarterly, and annual returns required under this act shall be made upon forms to be prescribed by the commissioner.

The commissioner for good cause may extend the time for making any return required under the provisions of this act, and may grant such reasonable additional time

within which to make such return as he may deem proper, but the time for filing any such return shall not be extended beyond the 15th day of the month next succeeding the regular due date of such return.

Returns To Be Made—When—How Made.

SEC. 6. On or before thirty days after the end of the tax year, each person liable for the payment of a privilege tax under section 2 and succeeding sections of this act shall make a return showing the gross proceeds of sales, or gross income of business, and compute the amount of tax chargeable against him in accordance with the provisions of this act, and deduct the amount of monthly or quarterly payments (as hereinbefore provided), and transmit with his report a remittance in the form required by section 13 of this act covering the residue of the tax chargeable against him to the office of the commissioner; such return shall be verified by the oath of the taxpayer, if made by an individual, or by the oath of the president, vice-president, secretary or treasurer of a corporation, if made on behalf of a corporation. If made on behalf of a partnership, joint adventure, association, trust, estate, or any other group or combination acting as a unit, any individual delegated by such firm, co-partnership, joint adventure, association, trust, estate, or any other group or combination acting as a unit shall make the oath on behalf of the taxpayer. If for any reason it is not practicable for the individual taxpayer to make the oath, the same may be made by any duly authorized agent. The commissioner for good cause shown may extend the time for making the annual return on the application of any taxpayer and may grant such reasonable additional time within which to make the same as may, by him, be deemed advisable.

Commissioner to Correct Error.

SEC. 7. As soon as practicable after the return is filed the commissioner shall examine it; if it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed. If the amount

already paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid shall be credited against the subsequent payment; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of this act.

If the amount already paid is less than the amount which should have been paid, the difference to the extent not covered by any credits under this act, together with interest thereon at the rate of one-half of one per centum per month from the time the tax was due shall be paid upon notice and demand by the commissioner.

If any part of the deficiency is due to negligence or intentional disregard to authorized rules and regulations with knowledge thereof but without intent to defraud, there may be added as damages, ten per centum of the total amount of the deficiency in the tax, and interest in such a case shall be collected at the rate of one per centum per month on the amount of such deficiency in the tax from the time it was due, which interest and damages shall become due and payable upon notice and demand by the commissioner.

If any part of the deficiency is due to fraud with intent to evade the tax, then there shall be added as damages not more than one hundred per centum of the total amount of the deficiency in the tax, and in such a case the whole amount of tax unpaid, including charges so added, shall become due and payable upon notice and demand by the commissioner, and an additional one per centum per month on the tax shall be added from the date such tax was due until paid.

Taxpayer Must Keep Records—Failure to Make Returns—Duty and Power of Commissioner.

SEC. 8. It shall be the duty of every person engaging or continuing, in this State, in any business for which a privilege tax is imposed by this act to keep and preserve suitable records of the gross income, gross receipts or gross receipts of sales of such business and such other books or accounts as may be necessary to determine the amount of

tax for which he is liable, under the provisions of this act. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased, for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

If no return is made by any taxpayer required to make returns as provided herein, the commissioner may give written notice by registered mail to such taxpayer to make such returns within thirty days from the date of such notice and if such taxpayer shall fail or refuse to make such returns as he may be required to make in such notice, then such returns shall be made by the commissioner from the best information available, and such returns shall be prima facie correct for the purposes of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if payment be not made within thirty days after demand therefor by the commissioner, there shall be added not more than one hundred per centum as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. If such tax be paid within thirty days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one per centum per month from the time such tax was due until paid; provided, however, in the event such taxpayer in answer to said notice from the commissioner shall state that he is not required under the law to make such returns, the commissioner shall investigate that question fully before proceeding further under this section.

Tax Shall be Lien.

SEC. 9. The tax imposed by this act shall be a lien upon the property of any person subject to the provisions hereof, who shall sell out his business or stock of goods, or shall quit business, and such person shall be required to make out the return provided for under section 6 within ten days after the date he sold out his business or stock of goods, or quit business, and pay the tax imposed by section 2-c (two

per cent if sold at retail) and (one-eighth of one per cent if sold at wholesale or in bulk), and if sold in bulk, the purchaser or his successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said taxes due and unpaid until such time as the former owner shall produce a receipt from the commissioner showing that the taxes have been paid, or a certificate that no taxes are due. If the purchaser of a busines or stock of goods shall fail to withhold purchase money as above provided and the taxes shall be due and unpaid after the ten day period allowed, he shall be personally liable for the payment of the taxes accrued and unpaid on account of the operation of the business by the former owner.

Aggrieved Person May File Petition.

SEC. 10. If any person having made the return and paid the tax as provided by this act, feels aggrieved by the assessment made upon him for any year by the commissioner, he may apply to the tax commission by petition, in writing, within thirty days after the notice is mailed to him, for a hearing and a correction of the amount of the tax so assessed upon him by the commissioner, in which petition he shall set forth the reasons why such hearing should be granted and the amount in which such tax should be reduced. The tax commission shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted the tax commission shall notify the petitioner of the time and place fixed for such hearing. After such hearing, the tax commission may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same, may recover the amount paid, together with interest, in any proper action or suit against the commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in

order to maintain such suit. In any suit to recover taxes paid or to collect taxes the court shall adjudge costs to such extent and in such manner as may be deemed equitable.

Either party to such suit shall have the right to appeal to the Supreme Court of Mississippi as now provided by law. In the event a final judgment is rendered in favor of the taxpayer in a suit to recover illegal taxes, then it shall be the duty of the state auditor, upon receipt of a certified copy of such final judgment, to issue a warrant directed to the state treasurer in favor of such taxpayer to pay such judgment, interest and costs. It shall be the duty of the state treasurer to honor such warrant and pay such judgment out of any funds in the state treasury.

No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this act, or to restrain the enforcement of this act. The provisions of section 420, code of 1930, shall not apply to taxes imposed by this act.

It shall be the duty of any attorney for the commission or commissioner or the attorney general to represent the commission, the commissioner or any agent or employee, or the state of Mississippi in all legal matters relating to the enforcement, construction, application and administration of this act, and in any litigation which may be instituted by the commission or commissioner and in which they or either of them may become involved, upon the order and under the direction of the commissioners.

Warrant for Collection of Tax—Tax Shall Constitute Debt Due State.

SEC. 11. If any tax imposed or any portion of such tax be not paid within thirty days after the same has been determined to be due by the commissioner, he may issue a warrant under official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owing the same, found within his county, for the payment of the amount thereof, with damages, to the amount of 10% of the tax, in addition to the penalties imposed for failure to make or for making a fraudulent return and interest, and cost of executing the

warrant, and to return such warrant to the commissioner and pay to him the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant. The sheriff shall within five days after the receipt of the warrant, file with the circuit clerk of his county a copy thereof, and thereupon the circuit clerk shall enter in the judgment roll, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax, or portion thereof and damages for which the warrant is issued; and the day when such copy is filed; and thereupon the amount of such warrants so docketed shall become a lien upon the title to and interest in real and personal property, including choses in action, except negotiable instruments not past due, of the person against whom it is issued in the same manner as a judgment duly enrolled in the office of such clerk. The sheriff thereupon shall levy upon any property of the taxpayer, including negotiable instruments, in all respects, with like effect, and in the manner prescribed by law in respect to executions issued against property upon judgments or attachment proceedings, of a court of record and the remedies by garnishment shall apply and the officer shall be entitled to the same fees for his services in executing the warrant as now allowed by law for like services, to be collected in the same manner as now provided by law for like services.

A tax due and unpaid under this act shall constitute a debt due the state and may be collected by action in debt upon motion for judgment or other appropriate judicial proceedings, which remedy shall be in addition to all other existing remedies, and it shall constitute a lien upon all the property of the taxpayer except negotiable instruments not past due and the same may be collected together with an additional ten per cent of the amount of the tax and penalties imposed for failure to make or for making a fraudulent return, and the costs of collection, if paid within thirty days after the date it was due, and an additional two per cent of the amount of the tax for each succeeding thirty days elapsing before the tax shall have been paid; provided, however, that the additional two per cent penalty shall not

be applied until a ten day notice of delinquency shall have been sent to the taxpayer.

Any person against whom a tax shall be assessed as herein provided shall be restrained and enjoined upon the order of the chairman of the commission, by proper proceedings instituted in the name of the state of Mississippi, by suitable action, brought by the attorney general or any district attorney at the request of the commissioner, or the attorney for the commission or commissioner, from engaging or continuing in a business for which a privilege tax is required by the provisions of the act, until the taxes shall have been paid and until such person shall have complied with the provisions of this act, and such attorneys shall prosecute violations of criminal provisions of this act upon the request of the commissioner.

Annual Return—When To Be Made.

SEC. 12. The assessment of taxes herein made and the returns required therefor shall be for the year ending on the 31st day of December; provided, however, that if the taxpayer in transacting his business, keeps the books reflecting the same on a basis other than the calendar year, he may, with the assent of the commissioner, make his annual returns and pay taxes for the year covering his accounting period, as shown by the method of keeping the books of his business.

Is Additional Tax.

SEC. 13. The tax imposed by this act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder, except as in this act otherwise specifically provided. But no municipality or levee district shall be authorized to levy any tax by virtue of the provisions of this act.

Remittances—How Made.

All remittances of taxes imposed by this act shall be made to the commissioner by bank draft, check, cashier's check, money order, or money, who shall issue his receipts therefor to the taxpayer, when requested, and shall deposit all

moneys received in some bank or banks in this state, qualified as a state depository; provided, no remittance other than cash shall be final discharge of liability for the tax herein assessed and levied unless and until it has been paid in cash to the commissioner.

SEC. 13-a. On or before the fifth day of each month the total amount received from taxes levied under the provisions of this act during the preceding month shall be paid by the commissioner into the state treasury as provided by law.

SEC. 13-b. At the end of each month the auditor shall carefully check the books and records of the commissioner and his accounts with the bank or banks, and shall verify the amounts paid or to be paid into the state treasury. Any duty herein required of the auditor may be performed by an inspector employed under the provisions of section 3747 of the Mississippi code of 1930.

SEC. 13-c. The commissioner shall keep full and accurate records of all moneys received by him, and how disbursed; and shall preserve all returns filed with him under sections 5 and 6 of this act for a period of three years.

Letters in Report Not to be Divulged.

SEC. 14. Unless in accordance with the judicial order or as herein provided, the members of the state tax commission, its agents, clerks or stenographers shall not divulge the gross income, gross proceeds of sales or the amount of tax paid by any person as shown by the reports filed under the provisions of sections 5 and 6 of this act, except to members and employees of the state tax commission, and the income tax department thereof, for the purpose of checking, comparing and correcting returns, or to the governor, or to the attorney general, or any other legal representative of the state in any action is respect to the amount of tax due under the provisions of this act.

SEC. 14-a. The secretary of state shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this

state or organized under the laws of another state and admitted to do business in this state until the receipt of a notice from the commissioner to the effect that the tax levied under this act against any such corporation has been paid, if any such corporation is a taxpayer under the law, or until he shall be notified by the commissioner that the applicant is not subject to pay a tax hereunder.

Unlawful to Refuse to Make Returns—Penalty.

SEC. 15. It shall be unlawful for any person to fail or refuse to make the return provided to be made in sections 5 and 6 of this act, or to make any false or fraudulent return or false statement in any return, with intent to defraud the state or to evade the payment of the tax, or any part thereof, imposed by this act; or for any person to aid or abet another in any attempt to evade the payment of the tax, or any part thereof, imposed by this act; or for the president, vice-president, secretary or treasurer of any company to make or permit to be made for any company or association any false return, or any false statement in any return required by this act with the intent to evade the payment of any tax hereunder; or for any person to fail or refuse to permit the examination of any book, paper, account, record, or other data by the commissioner, or his duly appointed agent, as required by this act; or to fail or refuse to permit the inspection or appraisal of any property by the commissioner or his duly appointed agent, or to refuse to offer testimony or produce any record as required by this act. Any person violating any of the provisions of this section shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than five hundred dollars ($500.00), or imprisoned not exceeding six months in the county jail, or punished by both such fine and imprisonment, at the discretion of the court within the limitations aforesaid. In addition to the foregoing penalties, any person who shall knowingly swear to or verify any false or fraudulent statement, with the intent aforesaid, shall be guilty of the offense of perjury and, on conviction thereof, shall be punished in the manner provided by law. Any company for which false return, or a return containing a false statement as aforesaid shall be

made, shall be guilty of a misdemeanor and may be punished by a fine of not more than five hundred dollars ($500.00).

Administration of Act Vested in Chairman of the State Tax Commission.

SEC. 16. The administration of this act is vested in and shall be exercised by the chairman of the state tax commission, except as otherwise herein provided, and the enforcement of any of the provisions of this act in any of the courts of the state shall be under the exclusive jurisdiction of the chairman of the state tax commission who may require the assistance of and act through the prosecuting attorney of any county, or any district attorney, or any attorney for the commission, and may with the assent of the governor, employ special counsel in any county to aid the prosecuting attorney, the compensation of whom shall be fixed by and paid only upon the approval of the governor; but the district attorney or prosecuting attorney of any county shall receive no fees or compensation for services rendered in enforcing this act in addition to the salary paid to such officer. The chairman of the state tax commission shall appoint, as needed, such agents, clerks and stenographers as authorized by law, who shall serve under him, shall perform such duties as may be required, not inconsistent with this act, and are hereby authorized to act for the commissioner as he may prescribe and as provided herein. Each such agent shall execute a bond in the sum of five thousand dollars ($5,000.00) for the faithful discharge of his duties. All of such agents, clerks and stenographers may be removed by the chairman of the state tax commission for cause of which the commissioner shall be the final judge.

In case of violation of the provisions of this act the commissioner may decline to prosecute for the first offense, if in his judgment such violation is not wilful or flagrant.

Commissioner to Make Regulations.

SEC. 17. The commissioner shall from time to time promulgate such rules and regulations not inconsistent with this act for making returns and for the ascertainment, assessment and collection of the tax imposed hereunder as he

may deem necessary to enforce its provisions; and upon request shall furnish any taxpayer with a copy of such rules and regulations.

All forms, except the license to be issued under the provisions of section 3 hereof, necessary for the enforcement of this act shall be prescribed, printed and furnished by the commissioner; and the license prescribed by section 3 hereof shall be furnished by the auditor and accounted for as are privilege tax licenses, issued under the provisions of the privilege tax laws of this state.

Commissioner or Agent May Examine Books, etc.

SEC. 18. The commissioner or his authorized agents, may examine any books, papers, record, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required by sections 5 and 6 of this act, and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons. If any person summoned as a witness shall fail to obey any summons to appear before the commissioner or his authorized agent, or shall refuse to testify or answer any material question or to produce any book, record, paper or other data when required to do so, such failure or refusal shall be reported to the attorney general, the district attorney or county attorney, who shall thereupon institute proceedings in the proper court of the county where such witness resides to compel obedience to any summons of the commissioner, or his authorized agent; officers who serve summonses or subpoenas, and witnesses attending, shall receive like compensation as officers and witnesses in the justice of the peace courts; to be paid from the proper appropriation for the administration of this act.

Excess Payment May Be Refunded.

SEC. 19. If upon examination of any monthly or quarterly return made under this act, it appears that an amount of tax has been paid in excess of that properly due, then the amount in excess shall be credited against any tax or installment thereof then due from the taxpayer, under any subsequent

monthly or quarterly return; and if upon examination of any annual return it appears that an amount of tax has been paid in excess of that properly due, such excess may be credited upon any amount due under any subsequent return of such taxpayer, during any succeeding years, or in the event that the taxpayer does not continue in business and has no subsequent liability for such tax, or prefers to obtain a refund of such excessive payment of taxes before any subsequent liability for such taxes accrues, such overpayment may be refunded as provided by section 3276 of the Mississippi code of 1930; and the commissioner shall issue to such taxpayer, upon request, a certificate of overpayment, which certificate shall be sufficient evidence to support a claim for the refund of such amount of overpayment. Any taxes recovered by suit by any taxpayer may be refunded in like manner, but such claim shall be accompanied by a copy of the order, judgment or decree of the court in which such recovery was had by the taxpayer.

Prior Rights or Actions Not Affected by This Act.

SEC. 20. Nothing in this act shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under the emergency revenue act of 1932, or the revenue act of 1930, prior to the date on which this act becomes effective, whether such assessments, appeal, suit, claim or action shall have been begun before the date on which this act becomes effective, or shall thereafter be begun; and the sections of the emergency revenue act of 1932, or the revenue act of 1930, amended or repealed by this act are expressly continued in full force, effect and operation for the purpose of the assessment and collection of any taxes due under any such laws prior to the date on which this act becomes effective, and for the imposition of any penalties, forfeitures or claims for a failure to comply therewith.

Invalidity of Part of Act Not to Invalidate Entire Act.

SEC. 21. If any clause, sentence, paragraph or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not

affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Conflicting Laws Repealed.

SEC. 22. That chapters 90 and 91, laws of Mississippi, 1932, being an act imposing a privilege tax on gross income and gross proceeds of sales, be and the same are hereby repealed.

SEC. 23. That this act shall take effect and be in force from and after March 1, 1934.

Approved February 28, 1934.

Section 2-f of said act, as amended by Section 6, Chapter 158, Laws of 1936, levies a tax as follows:

"(1) Upon every person engaging or continuing within this state in any of the following businesses: Billiard halls, bowling alleys, cleaning and pressing, cold storage plants, cotton compresses, cotton gins, custom planing mills, dyeing, funeral parlors and undertakers, hotels, laundries, storage and transfer and warehouses, there is likewise hereby levied and shall be collected a tax, on account of the business engaged in, equal to two per cent of the gross income of the business."

Section 2-h of said act, as amended by Chapter 222, Laws of 1934, is as follows:

"In computing the amount of tax levied under this act, there shall be excepted from the gross income of the business, or gross proceeds of sale, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, and upon the business of transporting gravel when consigned to a county, municipality, or sub-division thereof, and used for road construction or maintenance, or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States."

APPENDIX C.

193 Southern Reporter 329.

SUPREME COURT OF MISSISSIPPI, DIVISION A.

No. 34011.

COMPRESS OF UNION *v.* STONE, Chairman of Tax Commission.

Jan. 29, 1940.

1. Licenses key 19(3)

Under statute providing that in computing amount of state privilege tax there should be excepted from gross proceeds of sales so much thereof as was "derived from sales to United States government," only income from sales to the government may be deducted. Laws 1934, c. 119, section 2-h, as amended by c. 222.

2. Taxation key 6

A state tax on income derived from a federal government agency is permissible.

3. Licenses key 11(1)

An amount received by cotton compressing company from the Federal Commodity Credit Corporation for services performed by company which compressed cotton for the corporation was subject to state privilege tax. Laws 1934, c. 119, and amendments Laws 1934, c. 222; Laws 1936, c. 158.

4. Licenses key 5

The state privilege tax statute, when construed as imposing tax on amount received by a cotton compressing company from Federal Commodity Credit Corporation for services performed by the company which compressed cotton for the corporation, was not invalid as a tax on a federal governmental agency. Laws 1934, c. 119, and amendments Laws 1934, c. 222; Laws 1936, c. 168.

Appeal from Circuit Court, Newton County; Percy M. Lee, Judge.

Action by Compress of Union against A. H. Stone, Chairman, State Tax Commission, to recover amount of privilege taxes paid under protest. From judgment sustaining demurrer and dismissing the cause, the plaintiff appeals.

Affirmed.

Flowers, Brown & Hester, F. W. Bradshaw, and Robert Burns, Jr., all of Jackson, for appellant.

Greek L. Rice, Atty. Gen.; by J. A. Lauderdale, Asst. Atty. Gen., for appellee.

ANDERSON, *Justice:*

Appellant is engaged in compressing cotton. The Commodity Credit Corporation is a Federal Agency; its entire stock is owned by the Federal Government. It had a large amount of cotton compressed by appellant for which service it paid appellant the sum of $41,025. Claiming authority so to do under Chapter 119 of the Laws of 1934, and amendments thereto, Chapter 222 of the Laws of 1934, and Chapter 158 of the Laws of 1936, the State Tax Commission levied and collected from appellant two percent on said amount, aggregating $820.51. Appellant paid the tax under protest and brought suit against the tax commission to recover it back. The case is here on declaration, exhibits thereto, and demurrer. The trial court sustained the demurrer and dismissed the cause. From that judgment, this appeal is prosecuted.

(1) The questions are: (1) Whether under the provision of Section 2-h, Chapter 119 of the Laws of 1934, as amended by Chapter 222 of the Laws of 1934, appellant was authorized to deduct from its gross income the said amount so paid it by the Commodity Credit Corporation; and (2) if that question is to be answered in the negative, whether the statute violates the Federal Constitution in that it is a tax on one of its governmental agencies. The statute in plain terms taxes such income unless it is excepted by the amendment, Chapter 222, Laws of 1934, which is in this language: "Sec. 2-h. In computing the amount of tax levied under this act, there shall be excepted from the gross in-

come of the business, or gross proceeds of sale, as the case may be, so much thereof as is derived from sales to the United States government or the state of Mississippi, its departments and institutions, and upon the business of transporting gravel when consigned to a county, municipality, or sub-division thereof, and used for road construction or maintenance, or from business which the state of Mississippi is prohibited from taxing under the constitution of this state or the constitution of the United States." We are of the opinion that the language "derived from sales to the United States government or the state of Mississippi, its departments and institutions" qualifies what goes before. In other words, it is only income from sales to the government that is to be deducted.

(2-4) It is not a tax on a federal governmental agency, but a tax on income derived from such an agency; that is permissible under the federal constitution. An income tax on rents and profits from land is not a tax on the land. New York ex rel. Cohn *v.* Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 666, 108 A. L. R. 721. A tax on interest received from bonds is not a tax on the bonds, Hale *v.* Iowa State Board of Assessment and Review, 302 U. S. 95, 58 S. Ct. 102, 82 L. Ed. 72. A tax on the gross income of the proceeds of a lease is not a tax on the lease. A federal income tax on compensation received by a state employee is not a tax on the state. Helvering *v.* Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 1427. "An occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal government, even though the imposition of the tax may increase the cost of the government of the work contracted to be done." James *v.* Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 157, 114 A. L. R. 318. There is no provision of the statute authorizing the tax on income derived from services to be passed on to the consumer. In the James case, the Supreme Court of the United States reviewed several previous decisions of that Court qualifying and limiting their language.

Affirmed.

APPENDIX D.

193 Southern Reporter 794.

SUPREME COURT OF MISSISSIPPI

No. 33932.

MISSISSIPPI STATE TAX COMMISSION

vs.

BROWN.

Feb. 19, 1940.

1. Courts key 90(2).

A decision reached by an equally divided Supreme Court is the decision of the Supreme Court and should be followed as a precedent.

2. Taxation key 104.

The income tax act of 1934 was not intended to tax income derived from national bank stock which had been taxed in accordance with value of stock as provided by statute. Laws 1934, c. 120; Code 1930, section 3138; 12 U. S. C. A., section 548.

SMITH, C. J., and ANDERSON and GRIFFITH, JJ., dissenting.

In Banc.

Appeal from Chancery Court, Hinds County; V. J. Stricker, Chancellor.

Suit by J. T. Brown against the Mississippi State Tax Commission to annul assessment of tax on income from national bank stock. From the judgment, the defendant appeals.

Affirmed.

J. A. Lauderdale, Asst. Atty. Gen., for appellant.

Flowers, Brown & Hester, of Jackson, for appellee.

ETHRIDGE, *Justice:*

The Appellee owned several shares of capital stock in a national bank, and the State Tax Commission included the dividends received by him from such stock in assessing his income taxes under chapter 120, Laws of 1934. The appellee filed his bill in the Chancery Court of Hinds county for hearing upon the action of the State Tax Commission in making such assessment for income tax upon this capital stock, challenging the right and power of the State Tax Commission to do so, and setting forth the allegations upon which he sought relief. In his petition he alleged that the bank in which he held stock was a national bank, an instrumentality of the Federal Government, the capital, franchise and operations of which are not taxable by the state, except by consent of the Congress of the United States; and the only consent given by Congress to the several states to tax national banks is found in section 548 of the title 12 of United States Code Annotated; that the state of Mississippi had elected to tax the shares of national banks according to their value, as provided in section 3138 of chapter 61, Code of 1930; and that all taxes due the state of Mississippi upon shares of the said bank in which the appellee owned shares for the preceding years had been duly assessed and paid to the state, and that therefore the share-holders of the bank cannot be required to pay anything further thereon, either income taxes or otherwise, since by electing to tax the said shares, as above shown, the state of Mississippi exhausted its right to tax the bank or its shares, or the income therefrom. And appellee prayed for general relief.

The Tax Commission, through the Attorney General, demurred to the petition or bill of the appellee, which demurrer was overruled by the Chancellor. Thereupon the Tax Commission filed an answer, admitting that the petitioner is a citizen and taxpayer of Hinds county, Mississippi, and that he prepared and filed, within the time provided by law, his income tax returns to the state of Mississippi; but denied that said return set forth all income taxes due by him for the said year, and alleged that the petitioner or complainant, without authority of law, deducted from his

gross income the sum of $2,022, dividends received by him on shares of stock in a national bank, which he claimed were not subject to the tax; and denied that the petitioner had paid all the income tax due by him to the state of Mississippi, alleging that said sum so received as dividends constituted part of his net income subject to taxation under chapter 120, Laws of 1934.

The answer admitted that the bank was a national bank, and as such an instrumentality of the Federal Government, and that the bank was not taxable by the state, except under consent of Congress so to do. It averred that section 548, title 12 U. S. Code Ann., specifically authorized the state of Mississippi to levy an income tax on the net income of petitioner when the same is derived from shares owned by him in the said bank; admitted that the state levied ad valorem taxes on the shares according to their value; but averred that under subdivision (c) of section 548, title 12, U. S. Code Ann., the state was authorized to levy a tax on the net income of petitioner.

On the hearing the Chancery Court held that the appellee, the petitioner, was not subject to the tax on the income from the shares of said national bank, and found that the petitioner was improperly assessed therewith, and annulled such tax. From which judgment this appeal is prosecuted.

We are of the opinion that the Chancellor was correct in so holding. It was not the intention of the legislature of 1934, in enacting chap. 120, Laws of 1934, to tax income derived from shares in national banks which had been taxed in accordance with the value of such shares, as provided by section 3138, Code of 1930, the state having elected to tax the shares of national banks as therein provided, and not under the other methods proposed in section 548, title 12 U. S. Code Ann., Chapter 120, Laws of 1934, was a new enactment upon the subject of income taxes, repealing chapter 124, Code of 1930, and chapters 96 and 97, Laws of 1932. This act in directing the assessment, levy and collection of income taxes for each calendar year used the phrase "taxable income," the basis of taxation being provided on "the first $2,000.00 of taxable income or any part thereof, at the rate of two and one-half per centum;

"On the next $3,000.00 of taxable income or any part thereof, at the rate of three and one-half per centum;

"On the next $10,000.00 of taxable income, or any part thereof, at the rate of five per centum; on all taxable income in excess of $15,000.00 at the rate of six per centum." Section 3.

At the time of the enactment of this statute it was the settled law of the United States, as shown by a decision of the Supreme Court at that time, that Federal agencies could not be taxed by the states without the consent of Congress, and that the states were limited to the methods provided in the Federal statute, giving its consent to such assessment only to a limited extent, and on specified conditions. Davis *v.* Elmira Savings Bank, 161 U. S. 275, 283, 16 S. Ct. 502, 40 L. Ed. 700, Gray's Limitation on Taxing Power, 398, section 788, "and cases cited below." It must be presumed that the legislature, in enacting the statute, had knowledge of the Federal law and of the court decisions construing it.

By clause 3 of article 6 of the United States Constitution, U. S. C. A., it is provided: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

The requirement that the members of the several state legislatures, and all executive and judicial officers, both of the United States, and of the several states, shall be bound by oath or affirmation to support the Constitution, imposes upon all those exercising the powers of any office the duty of supporting the Constitution, which carries with it the duty of careful examination of the Constitution, and of the construction placed upon it by the highest Court.

The Mississippi Constitution also requires members to take a special oath set forth in section 40 of the Constitution of 1890, which reads as follows: "Members of the legislature, before entering upon the discharge of their

duties, shall take the following oath: 'I, —— ——, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and of the state of Mississippi; that I am not disqualified from holding office by the Constitution of this state; that I will faithfully discharge my duties as a legislator; that I will, as soon as practicable hereafter, carefully read (or have read to me) the Constitution of this state, and will endeavor to note, and as a legislator to execute, all the requirements thereof imposed on the legislature; and I will not vote for any measure or person because of a promise of any other member of this legislature to vote for any measure or person, or as a means of influencing him or them so to do. So help me God.' ''

It must be presumed, therefore, that every member of the legislature gave thought and study to the matter of his obligation to support the Constitution, and governed his actions in accordance with the requirements of the Federal Constitution as interpreted at that time by the highest judicial authority of the nation, which has the final power of interpreting the Constitution, which interpretation is binding upon every officer of the Federal Government, and of the state government.

It is further provided in clause 2 of article VI of the Constitution of the United States, U. S. C. A., that it is the supreme law of the land. It reads as follows: ''This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.''

Turning to other parts of the Constitution, we find that the legislative power of the Federal Government, granted by the Constitution of the United States, is vested in the Congress of the United States, which shall consist of the Senate and House of Representatives; such powers being specified in clauses 1 to 18 of section VIII of article 1 of the Constitution, the 18th clause reading, ''To make all Laws

which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."

It is, therefore, the duty of the legislature, in passing state legislation, to conform to the Constitution of the United States, as then understood and interpreted by the highest judicial body vested with authority to construe it. The statute here involved must now be construed just as it would have been, had the controversy arisen shortly after the statute became effective; at which time, in the light of the then existing decisions of the United States Supreme Court, we would have been under duty to limit the broad language of the statute, wherever the language was general enough to include the tax here involved, so as to make it conform to the Federal law as interpreted by the highest court of the United States—which is the supreme law of the land.

It is a familiar rule of statutory construction, that if reasonably possible, statutes shall be construed to conform to constitutional requirements, and that broad language will be limited to conform to constitutional requirements. This was held in the case of New Orleans M & C. R. Co. *v.* State, 110 Miss. 290, 70 So. 355, wherein the general language of privilege tax laws on railroads, levied by the legislature of the state upon classification, was limited to make the statute operative only with respect to intrastate commerce, and not with respect to interstate commerce. This rule is a principle of general statutory construction. See Black on Statutory Construction, page 103, where it is said: "In construing a doubtful or ambiguous statute, the courts will presume that it was the intention of the legislature to enact a valid, sensible, and just law, and one which should change the prior law no further than may be necessary to effectuate the specific purpose of the act in question. The construction should be in harmony with this assumption whenever possible. But presumptions of this kind cannot prevail against the clear and explicit terms of the law."

It is further said, on page 105 of the same book, "It is presumed that the legislature does not design any attempt

to transcend the rightful limits of its authority, to violate the principles of international law, or to give extraterritorial effect to its statutes."

In Kennington *v.* Hemingway, 101 Miss. 259, 57 So. 809, 810, 39 L. R. A., N. S., 541, Ann. Cas. 1914B, 392, a statute required contracts and transactions between husband and wife to be reduced to writing and actually recorded on the public records of the county to make it valid; and the Court limited the broad language of the statute, holding that it did not apply to the gift by the husband to his wife of a diamond ring there involved. It was there held that the gift by a husband to his wife of clothing, etc., suitable to her station in life, is valid as against a third person, although such gift is not evidenced by a written instrument, acknowledged and recorded as provided by section 2522, Code 1906. It was also held that in the construction of statutes, courts chiefly desire to reach the real intention of the framers of the law, and knowing this to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or within, wider or narrower than the mere letter of the enactment.

The language there construed was very broad, and provided that, "Transfer or conveyance of goods and chattels, or lands or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be; and possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record."

In Black on Construction, etc., of Laws, supra, at page 110, it is said, "Every act of the legislature is presumed to be valid and constitutional until the contrary is shown.

All doubts are resolved in favor of the validity of the act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the constitution and avoid the consequence of unconstitutionality."

In Ascher & Baxter *v.* Edward Moyse & Co., 101 Miss. 36, 57 So. 299, in syllabus 8 it is said, "Courts in construing

a statute will presume that the legislature in enacting the statute was familiar with its own enactments and with the construction which the courts had placed on those enactments." This same idea is also the basis for the well settled doctrine in this state, that where a statute has been construed by the highest court having authority to construe it, and safeguard re-enactment in the statute without change, that the legislature has adopted as a part of the construction placed upon it by the court's decision.

In Henry *v.* Henderson, 103 Miss. 48, 60 So. 33, in syllabus 3 it is said, "Where a statute has been construed by the highest court of a state and afterwards re-enacted in substantially the same terms, the legislature by such re-enactment adopts along with the statute such construction."

See, also, to the same effect Burks *v.* Moody, 141 Miss. 370, 378, 3rd syllabus, 106 So. 528, 107 So. 279; Womack *v.* Central Lumber Co., 131 Miss. 201, 3rd syllabus, 94 So. 2. Also, 59 C. J., title "Statutes", section 625, Id. section 650; 12 C. J., title "Constitutional Law," section 220.

It is the duty of the Court to construe the acts of the legislature so as to uphold their constitutionality. Easterling Lumber Co. *v.* Pierce, 106 Miss. 672, 64 So. 461; Richards *v.* City Lumber Co., 101 Miss. 678, 57 So. 977; Natchez & S. R. Co. *v.* Crawford, 99 Miss. 697, 55 So. 596; State *v.* Louisville & N. R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150. In construing statutes, the Court should not attribute to the legislature a design to ignore constitutional limitation on their power to legislate. Of course, the legislature must be understood to have knowledge of the decisions existing at the time of their enactment and not be held to anticipate that the courts would afterwards change their decisions. Laws are presumed to be passed with deliberation, and with full knowledge of all existing laws on the subject, and it will be held reasonable to conclude that in passing a statute it was enacted with full knowledge of all such laws. Cumberland Telephone & Telegraph Co. *v.* State, 99 Miss. 1, 54 So. 446.

In 25 R. C. L., 959, section 215, under heading, "Meaning to be Given as of Time of Enactment," it is said, "There is always a tendency, it has been said, to construe statutes

in the light in which they appear when the construction is given. It is easy to be wise after one sees the results of experience. The true rule is that statutes are to be construed as they were intended to be understood when they are passed;" citing United States *v.* Union Pac. R. Co., 91 U. S. 72, 23 L. Ed. 224; Schuyler County *v.* Thomas, 98 U. S. 169, 25 L. Ed. 88; Com. *v.* Erie & N. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471; Platt *v.* Union P. R. Co., 99 U. S. 48, 63, 25 L. Ed. 424; Bloomer *v.* Todd, 3 Wash. T. 599, 19 P. 135, 1 L. R. A. 111; see, also, People *v.* Barnett, 319 Ill. 403, 150 N. E. 290; State *v.* Boston, etc., R. Co., 123 Me. 48, 121 A. 541.

Gray on Limitation on the Taxing Power, page 398, section 788, lays the rule down in regard to taxation of national banks, as follows: "It is well established law that the present system of National Banks, as well as the old United States Banks, constitute Federal agencies, organized by Congress under its power to regulate currency (citing Veazie Bank *v.* Fenno, 8 Wall. 533, 19 L. Ed. 482; Farmers Bank *v.* Dearing, 91 U. S. 29, 23 L. Ed. 196; Davis *v.* Elmira Savings Bank, 161 U. S. (275), 283, 16 S. Ct. 502, 40 L. Ed. 700; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. Ed. 850). Such agencies are exempt from State taxation, except in so far as Congress may have waived the exemption (McHenry *v.* Downer, 116 Cal. 20, 47 P. 779, 45 L. R. A. 737; Covington City Bank *v.* Covington, C. C., 21 F. (484), 489; Rich *v.* Packard Nat. Bank, 138 Mass. 527; Carthage *v.* First Nat. Bank, 71 Mo. 508, 36 Am. Rep. 494; Pittsburg *v.* First Nat. Bank, 55 Pa. 45). "National banks are instrumentalities of the Federal government created for public purposes, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles were axiomatic and are sanc-

tioned by the repeated adjudications of this court (Davis *v.* Elmira Savings Bank, 161 U. S. (275) 283, 16 S. Ct. 502, 40 L. Ed. 700). It follows then, necessarily, from these conclusions that the respective States would be wholly without power to levy, any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, were it not for the permissive legislation of Congress. (Owensboro Bank *v.* Owensboro, supra.)"

In Helvering *v.* Therrell, 303 U. S. 218-225, 58 S. Ct. 539, 82 L. Ed. 758, and other cases decided therewith, at the October term, 1937, it was said (2nd syllabus), "A State cannot tax appropriate means employed by the United States in the exercise of its delegated powers; and the United States cannot tax instrumentalities employed by a State in the discharge of its governmental duties." It was also held in the third syllabus that, "The exemption of State instrumentalities from Federal taxation does not extend to every instrumentality which a State may see fit to employ, but depends upon the nature of the undertaking."

In New York ex rel. Williams *v.* Weaver, 100 U. S. 539, 25 L. Ed. 705, it was held that the authority of a State to tax the shares of national banks is derived wholly from the act of Congress, and without the consent of Congress those shares cannot be taxed by the States. See, also, First Nat. Bank *v.* Albright, 208 U. S. 548, 28 S. Ct. 349, 52 L. Ed. 614.

In Mercantile National Bank *v.* City of New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. Ed. 895, it was held that neither national banks, their capital, nor shares of stock then held by individuals are subject to taxation by the States wherein they are located, without the consent of Congress.

Thus, the law from 1819, when the Supreme Court, in the case of McCulloch *v.* Maryland, 4 Wheat. 316, 429, 4 L. Ed. 579, handed down an opinion written by Chief Justice Marshall, until 1938, maintained the doctrine in the Supreme Court of the United States that the States could not tax any instrumentality of the Federal government without the consent of Congress.

The discussion in McCulloch *v.* Maryland, supra, was elaborate and lucid, and received the legal and judicial sanc-

tion of the country, as expressed by the majority of the courts. It would be interesting, if space permitted, to quote at length from this great original opinion by the greatest jurist in the history of the English speaking people. I shall quote only a brief passage therefrom: "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over to them. If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpa-

tion of a power which the people of a single State cannot give. * * *

"But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution?

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction, would be an abuse, to presume which, would banish that confidence which is essential to all government.

"But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is."

The Court held that the State of Maryland, therefore, could not tax the Bank of the United States, which was an instrumentality or agency of the national government, for the exercise of its delegated powers.

Subsequently, in 1824, the case of Osborn et al. *v.* President and Directors of the Bank of the United States, 9 Wheat. 738, 22 U. S. 738, 739, 740, 6 L. Ed. 204, was brought

before the Federal Supreme Court, which was asked to re-examine the doctrine announced in McCulloch *v.* Maryland, supra; this it did, reaffirming the doctrine there announced. The suit of Osborn *v.* Bank of the United States, supra, was brought to recover from the bank's directors money paid to the state of Ohio as taxes on the bank. The Court adhered to its former ruling, stating in the syllabus, "A state cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the circuit court."

The act creating the Bank of the United States was subsequently repealed by Congress, but many cases involving the supremacy of Congress in controlling and protecting the powers delegated to it, and upholding its rights, as against the rights of the states was decided. It is impossible to set forth all of the various decisions because of the length of this opinion. But subsequently the United States created National Banks for the purpose of exercising its money powers, and because an agency was needed through which its affairs would be efficiently conducted.

In Farmers & Merchants Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. Ed. 196, decided in 1875, it was held: "The States can exercise no control over national banks, nor in anywise affect their operation, except in so far as Congress may see proper to permit." in the course of its opinion in this case the Court said: "The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence, of the General Government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In complex system of polity which obtains in this country, the powers of government may be divided into four classes: —Those which belong exclusively to the States; Those which belong exclusively to the National Government; Those which may be exercised concurrently and independently by

both; And those which may be exercised by the States, but only with the consent, express or implied, of Congress.

"Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. Gilman *v.* Philadelphia, 3 Wall. 713, (18 L. Ed. 96); Ex parte McNeil, 13 (Wall. 236) 240 (20 L. Ed. 624, 625). The power of the states to tax the existing national banks lies within the category last mentioned."

The Congress gave limited consent to the taxation of National Banks, prescribing the conditions under which such banks could be taxed by the states. Numerous decisions support the doctrines announced in the last quoted decision; and the law applicable thereto has continued in effect at least until the year 1938,—if not until the present time, which we think it does.

In Gillespie *v.* Oklahoma, 257 U. S. 501, 42 S. Ct. 171, 66 L. Ed. 338, it was held, "A State may not impose a tax upon the net income derived by a lessee of restricted Creek and Osage Indian lands from sales of his share of oil and gas received under his leases." This case was decided in 1922, at the October term of the Court.

In Burnet *v.* Coronado Oil & Gas Co., 285 U. S. 393, 52 S. Ct. 443, 76 L. Ed. 815, it was held that, "The United States can lay no tax on instrumentalities of state government."

In Union Bank & Trust Co. *v.* Phelps, 288 U. S. 181, 53 S. Ct. 321, 322, 77 L. Ed. 687, 83 A. L. R. 1438, the Court in its opinion, said, "The several states lacked power to tax national bank shares, except as expressly permitted by Congress." Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 668, 19 S. Ct. 537, 43 L. Ed. 850; Des Moines Nat. Bank *v.* Fairweather, 263 U. S. 103, 106, 44 S. Ct. 23, 68 L. Ed. 191, (195); First Nat. Bank *v.* Anderson, 269 U. S. 341, 347, 46 S. Ct. 135, 70 L. Ed. 295.

"This is enough to negative the idea that shares of national and state banks are essentially the same for purposes of taxation. And the Alabama Supreme Court has held that under her Constitution, although the Legislature may have included them in the same class of taxable objects, there is permissible distinction between them. To accept

the doctrine that as the states can only tax a Federal instrumentality when permitted by Congress, therefore they cannot tax competitors of such instrumentalities within their general jurisdiction in some other fashion without violating the Fourteenth Amendment, would be both illogical and destructive of their proper independence. Such instrumentalities are exempted from State taxation without the express consent of Congress, by the Federal Constitution. They are of a class wholly distinct from the property of ordinary corporations or individuals, and this fact cannot be disregarded by the state."

In Oklahoma ex rel. Oklahoma Tax Comm. *v.* Barnsdall refineries, 296 U. S. 521, 56 S. Ct. 340, 80 L. Ed. 366, it was held that, "A tax levied by the state of Oklahoma on each barrel of oil produced in the state and used to defray the expenses of administering the State Oil and Gas Proration Law is not within the consent given by Act of Congress of March 3, 1921, authorizing the State of Oklahoma to levy a tax upon the gross production of oil by lessees of lands of the Osage tribe of Indians in Osage County, with the proviso that all taxes so collected shall be in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, where such statute was enacted in contemplation of the then existing production tax which was distributable in part to the counties and thus would be of benefit to the Indian owners of lands in Osage County."

In the case of New York ex rel. Rogers *v.* Graves, 299 U. S. 401, 57 S. Ct. 269, 81 L. Ed. 306, it was held that the Federal government may use a corporation as a means to carry into effect substantive powers granted by the Constitution; and that such corporation was immune from state taxation; and also that where a corporation is immune from state taxation as an instrumentality of the Federal government, fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune. This decision was rendered at the October, 1936, term of the Supreme Court of the United States; and shows that up to that time, at least, states could not tax instrumentalities of the Federal government, except with the con-

sent of Congress, and on conditions and to the extent prescribed by Congress.

All the decided law, therefore, at the time of the enactment of the statute here involved was to the effect that Federal instrumentalities were not taxed, and could not be taxed without the consent of Congress. And we must assume that the legislature enacted the statute here involved in the light of these decisions, and intended to conform to them; and its action must be interpreted in the light of these decisions.

The legislature cannot be held to foresee that the Court would change its decisions, and legislative acts cannot be rightfully interpreted in the light of decisions rendered after the enactment of the statute.

The Sixteenth Amendment to the Federal Constitution, U. S. C. A., enlarged the power of Congress to levy income taxes without apportionment among the several states, and without regard to enumeration; but it did not confer upon the states any power, and their power remains as it existed prior to the Sixteenth Amendment.

We have gone elaborately into the decisions of the Supreme Court of the United States upon the subject involved, largely because of difference of opinion among the Judges of this Court. The conclusion reached is that the Legislature did not intend to tax income upon shares of national banks; and although this decision is reached by an equally divided Court, under the Mississippi law it is the decision of the Court. Robertson, State Revenue Agent *v.* Mississippi Valley Co., 120 Miss. 159, 81 So. 799, 801. In fact, the result of the decision in such case is concurred in by four judges, one of whom is the trial judge, who is charged with the duty of deciding a controversy originally, and whose opinion, when approved by half of the Judges of the Supreme Court, becomes the law, founded on sound reason and public necessity. The Supreme Court is composed of six Judges, and it will sometimes happen that there is an equal division of opinion between the Judges in regard to the correctness of the holding of the trial court. It was said in the case of Robertson, State Revenue Agent *v.* Mississippi Valley Co., supra, in announcing the position

of the Court in making such a decision an affirmative settlement of the law in the case, "Such a division of the court is liable to occur at any time; and there are so many cases in which, by reason of interest, consanguinity, or former connection with the controversy, some one judge is disqualified from sitting, that there would be constant liability to an equal division if the court consisted of an unequal number. If, therefore, a decision made may be disregarded by a circuit judge because not made by a majority, we have and can have no settled law for the state at large, and each circuit judge will determine for himself conclusively what shall be the law for his circuit, and may make it different from the law of the adjoining court. This would so much resemble a judicial scandal that I should deem it my duty to prevent it by yielding my own opinion when the same question should come up again, if yielding should be essential to prevent such a consequence. The notion that there can be anything improper or opposed to good morals in a judge yielding his opinion when a proper administration of justice requires it is one I do not quite understand. Judges are certainly doing that every day; it would be a great mistake to assume that every judgment in which a court unites expressed in all respects the views of every concurring judge."

(1) It must, therefore, of necessity be recognized that the decision of the court below, when approved by an affirmance, even by an equally divided court, had received the judicial judgment of four judges, all of whom are equally charge ! with the duty of administering the law in accordance with the Constitution. Such an opinion, then, may be written by the affirming Judges as supports the conclusion reached, which thereafter should be followed as a precedent, regardless of personal opinion. It frequently happens that personal and judicial opinion diverge, and sometimes lie far apart. But a judge should follow the judicial path, and act upon judicial opinion when the law has been settled. Often a judge of the appellate court would decide a case differently from his predecessors, were it a matter of original decision. There should be stability in the law;

and if every judge followed his personal opinion, rather than the judicial opinion of his associates and predecessors, there would be no such thing as a settled rule. The public could not safely rely upon the advice of counsel, who must form his opinion upon the decisions of the Court. This Court has given protection to citizens from the effect of overruling cases, holding that transactions had or done under a construction making the act valid at the time it was done continue legal, although afterwards a change of decision was made by the Court. See Wisconsin Lumber Co. *v.* State, 97 Miss. 571, 54 So. 247; State *v.* Longino et al., 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371.

(2) A majority of the Court are of the opinion that section 548, title 12 U. S. Code Ann., does not permit the State to levy an income tax upon the dividends from shares of stock in national banks, because the state had elected to tax the shares of national banks on their value to the owners of such shares, as provided in the first division of said act of Congress; and that if such act of Congress was valid, the state was without power to impose an income tax upon such shares, as a part of his income tax.

Three of the Judges are of opinion that Congress was without power, under the Constitution, to forbid the state to levy an income tax upon the owners of such shares; that such power exists in the state, free from congressional control.

It is a serious thing to undertake to overturn a statute of the United States, passed by the Congress and approved by the President; and while it may be possible for Judges to so hold, we do not have the final decision in such questions. We think it unnecessary to go into a discussion of the constitutional power of the Congress to enact the statute here involved, but in view of the decisions already cited, which have not been overruled, so far as the taxation of national banks is concerned, we think we could not hold the act unconstitutional. That question should be reserved until it becomes absolutely necessary to so decide. Every reasonable doubt in regard to the constitutionality of the statute should be resolved in its favor.

It follows from these views that the judgment of the court below is affirmed.

Affirmed.

SMITH, Chief Justice (dissenting).

As will hereinafter appear, I am in accord with much that is said in the opinion of my Brother Ethridge.

The record presents three questions:

1. Does Chapter 120, Laws 1934, require dividends on shares of stock in a national bank to be included in an assessment of the owner's income for taxation? Should that question be answered in the affirmative, then

2. Does Section 548, Tit. 12 U. S. C. A., permit this to be done? Should that question be answered in the negative, then

3. Is the permission of Congress necessary to enable a state to include dividends on shares of stock in a national bank in the assessment of the owner's income for taxation?

Ordinarily, these questions should be discussed in the order in which I have stated them, but, for convenience, the first will be discussed last.

First. Section 548, Tit. 12 U. S. C. A., not only does not permit, but forbids, the inclusion of dividends on shares in a national bank by the State of Mississippi in the taxable income of the owner.

This statute assumes, which assumption had at the time of its enactment a qualified approval by the courts (Graves *v.* People of State of New York ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927, 120 A. L. R. 1466), that a tax on income is a tax on the source from which the income is derived. It provides:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3)

tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

Mississippi taxes national and state banks on the shares of their stock, Section 3138, Code 1930, and cannot, therefore, under Section 548, Tit. 12 U. S. C. A., include dividends derived from their stock in the taxable income of an owner or holder thereof, unless permission so to do is given in subdivision (c) of Clause 1 of the statute, which reads as follows: "(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations."

This subdivision of the statute does two things: (1) prohibits discrimination in taxation against national banks in favor of other financial, mercantile, manufacturing, and business corporations; and (2) permits states taxing national banks in one of the ways provided by the preceding

first paragraph of the section to include also, within the prescribed limitations, dividends from the shares of stock thereof in the taxable income of the owners.

Clause 1, in all of its provisions, seems to deal only with what a state can do when taxing national banks by the third and fourth method permitted by the first paragraph of the section, i. e., tax such associations on their net income, or according to or measured by their net income. When national banks are taxed, the proviso permits the state to include dividends from shares of their stock to be included in the taxable income of the owners thereof, provided the same course is pursued as to other corporations and their shareholders.

As hereinbefore stated, Mississippi (Chap. 120, Laws 1934) taxes national banks according to the first method provided by the statute, i. e., on their shares of stock, so that the proviso of subdivision (c) of Clause 1 seems not to here apply. But if it be said that the proviso applies also to the first method of taxing national banks provided by the statute, i. e., on their capital stock (it could not, of course, apply to the second method there provided, that is, include dividends from national bank stock in the taxable income of the owner thereof), the same result would be reached.

In order for a state which taxes national banks in one of four ways provided by the Federal statute to include also dividends from their shares of stock in the taxable income of the owners thereof, three things must concur: (1) The state must impose "a tax on or according to or measured by the next income of, or a franchise or exercise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States;" (2) must impose a tax on the income of individuals; and (3) include therein "dividends from domestic corporations", etc.

Chapter 120, Laws 1934, imposes an income tax on corporations, but does not include dividends from their shares of stock in the taxable income of the owners thereof. It is true that the statute includes dividends from national and state bank stocks in the taxable income of the owner thereof, but no income tax is imposed on the banks themselves; con-

sequently the three conditions of the proviso of subdivision (c) of Clause 1 are not met thereby.

Second. The permission of Congress is not necessary to enable a state to include dividends from shares of stock in a national bank in the owner's taxable income. Nor has Congress the constitutional power to forbid a state to so do. That a tax on income is a tax on the source from which the income is derived had the qualified approval of the Supreme Court of the United States when this statute was enacted, but has since been unqualifiedly disapproved by that Court. Graves *v.* People of State of New York, ex rel. O'Keefe, supra, and authorities there cited, which accords with State ex rel. Knox *v.* Gulf, M. & O. R. Co., 138 Miss. 70, 104 So. 689, and Compress of Union *v.* Stone, Chairman, State Tax Commission, Miss., 193 So. 329, recently decided by this Court but not yet reported (in state report).

The tax here under consideration being, therefore, not a tax on a national bank, or on its shares of stock, its imposition is for the determination of the state alone; and the fact that the income is derived from the shares of a national bank confers on Congress no power to interfere therewith.

Third. Section 3, Chapter 120, Laws 1934, imposes an income tax "upon the entire net income of every resident individual, corporation, association, trust or estate."

Section 14 of the statute exempts from the tax certain designated organizations, including national banks and state banks.

"The term net income means the gross income as defined hereunder, less the deductions allowed". Sec. 6, Chap. 120, Laws 1934. Gross Income "includes * * * dividends * * * of any business carried on for gain or profit * * *, and incomes derived from any source whatever". Sec. 7, Chap. 120, Laws 1934. It does not include "Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax." Sec. 7, par. (b) (8), Chap. 120, Laws 1934.

It thus appears that national and state banks are not taxed on their income, and, consequently, dividends on their shares of stock are to be included in the income of the owner thereof. Any doubt as to this disappears when the statute is examined in connection with its predecessor, (Chap. 124, Code 1930. Paragraph (b) (8) of Section 5033 of that chapter provides that the term "gross income" does not include "Income received during the taxable year as dividends from a corporation on which such corporation has already paid or is liable by assessment to pay an income tax, or *dividends from a national bank or state bank organized under the laws of the state of Mississippi.*" (Italics supplied.) When the statute was re-enacted as Chapter 120, Laws 1934, this paragraph of Section 5033 of the Code became paragraph (b) (8) of Section 7 of Chapter 120, Laws 1934, and was amended by eliminating therefrom the words "or dividends from a national bank or state bank organized under the laws of the state of Mississippi".

But it is said that the Legislature knowing when the statute was enacted that the Supreme Court of the United States was then holding that a tax on income was a tax on the property from which it was derived, and interpreting Title 12, Sec. 548, U. S. C. A., to prohibit it from including dividends from shares in a national bank in the taxable income of the owner thereof, did not intend by Chapter 120, Laws 1934, to include such dividends in the taxable income of the owners of such shares.

I do not know what the Legislature here had in mind, except as disclosed by the words of the statute. My guess, which is all that anyone can venture, would be that it construed Tit. 12, Sec. 548, U. S. C. A., to permit the imposition of the tax, and acted accordingly.

The language of Chap. 120, Laws 1934, is plain and unambiguous. Income from state banks and national banks are dealt with together, by the same words in the same sentences, not separately. What the statute directs as to one, it directs also as to the other. And I know of no rule of construction which would permit the Court to hold that the statute was intended to apply to one and not the other—that

it was intended to apply to income from shares in state banks but not to income from shares in national banks.

The State Tax Commission committed no error, in my opinion, in including dividends from the appellee's shares in a national bank in his taxable income, and the court below should have dismissed his petition seeking the annulment of this act of the Commission.

Griffith and Anderson, JJ., concur in this opinion.

EXHIBIT E.

Constitution of the State of Mississippi.

Article 6.

JUDICIARY.

* * * * * * *

SECTION 145. The Supreme Court shall consist of three judges, any two of whom, when convened, shall form a quorum. The legislature shall divide the state into three Supreme Court districts, and the governor, by and with the advice and consent of the senate, shall appoint one judge for and from each district; but the removal of a judge to the state capital during his term of office shall not render him ineligible as his own successor for the district from which he has removed. The present incumbents shall be considered as holding their terms of office from the state at large.

Additional Sections of the Constitution of Mississippi Not Being Amendments of Previous Sections.

SECTION 286. The Supreme Court shall consist of six judges, that is to say, of three judges in addition to the three provided for by section 145 of this Constitution, any four of whom when convened shall form a quorum. The additional judges herein provided for shall be selected one for and from each of the Supreme Court districts in the manner provided by section 145 of this Constitution, or any

amendment thereto. Their term of office shall be as provided by section 149 of this Constitution, or any amendment thereto.

SECTION 287. The Supreme Court shall have power, under such rules and regulations as it may adopt, to sit in two divisions of three judges each, any two of whom when convened shall form a quorum; each division shall have full power to hear and adjudge all causes that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the full court or a quorum thereof.